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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

&c. &c.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

High Court of Chancery,

AND OF

SOME SPECIAL CASES ADJUDGED

IN THE

Court of King's Bench:

COLLECTED BY

WILLIAM PEERE WILLIAMS,

LATE OF GRAY'S INN, ESQ.

PUBLISHED, WITH NOTES, REFERENCES, AND TABLES OF THE NAMES OF THE CASES, AND OF THE PRINCIPAL MATTERS,

BY HIS SON,

WILLIAM PEERE WILLIAMS,

OF THE INNER TEMPLE, ESQ.

EDITED (IN 1787 *AND* 1793*) WITH ADDITIONAL REFERENCES TO THE PROCEEDINGS IN THE COURT, AND TO LATER CASES,*

BY SAMUEL COMPTON COX,

OF LINCOLN'S INN, ESQ.

NOW ONE OF THE MASTERS OF THE COURT OF CHANCERY.

THE SIXTH EDITION,

WITH REFERENCES TO THE MODERN CASES,

BY JOHN BOSCAWEN MONRO, WILLIAM LOFTUS LOWNDES, AND JAMES RANDALL,

OF LINCOLN'S INN, ESQRS. BARRISTERS AT LAW.

IN THREE VOLUMES.

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A

TABLE

OF THE

NAMES OF THE CASES

TO THE

SECOND VOLUME.

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Alphabetically disposed, in such a double Order, as that the Cases may be found by the Names either of the Plaintiffs or Defendants.

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DE

TERM. PASCHÆ, 1722.

DAWES *versus* FERRERS.

CASE 1.

Lord Chancellor MACCLESFIELD.

Preced. in Chan. 589. 2 Eq. Ca. Ab. 331. pl. 6. 8 Vin. 317. pl. 13.

One seised in fee devised land to his grandaughter for life, remainder to his right heirs male for ever, and dies leaving his grandaughter his heir at law, and his deceased brother's son his next heir male; the devise of the remainder is void.

ONE seised in fee devises his lands to his grandaughter (being his heir at law) for her life, remainder to his own right heirs male for ever, and dies leaving his grandaughter his heir at law, and also leaving a deceased brother's son; being the next in the male line; which nephew brought this bill against the grandaughter, to perpetuate the testimony of the will, and for the writings, and to stay waste.

The defendant demurred, for that by the plaintiff's own showing, he had no title to the reversion or inheritance of the premises.

Against the demurrer it was objected, that it being the declared intention of the testator, that his grandaughter his heir should have an estate for life, it was the same, as if it had been said by the will, that the said heir at law should have *but* an estate for life; and the remainder being limited to the right heirs male of the testator, this was a description of the next heir male, or of such person as at the testator's death should be next heir male of his name; that agreeable thereto, the case of *Brown* and *Barkham* (*a*) had been determined by Lord *Cowper* (1), where the notion of Lord (*b*) *Coke*, "That he, who takes as heir male by purchase, must be completely heir, as well as heir male," was denied; and the case in 1 *Vent.* 372. of *Pybus* and *Mitford* was cited, as also the case there cited by Lord *Hale;* where a man having three daughters, and a deceased brother's son, by his will gave 2000*l.* to his daughters, and devised his land to his heir male, with a condition that the daughters, who were his immediate heirs, should forfeit their legacies, in case they should give the heir male any disturbance as to the land; upon which it was resolved, that the devisor

[2]

(*a*) 2 Vern. 729. Precedents in Chan. 442, 461.

(*b*) 1 Inst. 24. b.

(1) On a bill of review brought before Lord *Hardwicke* in November, 1741, the decree in *Brown* v. *Barkham* was affirmed, but (according to the note of this case in Harg. Co. Litt. note. (3) to 24. (b) his Lordship considered the case as an exception to a general rule.

DAWES *v.* FERRERS.

taking notice that the others were his heirs, the limitation to his brother's son, by the name of heir male, was a good name of purchase.

But Lord Chancellor interrupted the plaintiff's counsel, saying, that he would not suffer the bar to dispute what was the foundation and landmark of the law; and though what was contended for might be reasonable, if it were to be then first adjudged, yet, whatever the law was, provided it were certain and known, it would be well for the subject, though in some particular instances it might seem unreasonable; that in the case of *Ford* (1) and Lord *Ossulston*, the remainder was limited by the will to the heirs male of Sir *Edward Ford*, and this was determined to be void, at trials at bar, in every court in
[3] Westminster-hall, and appeared to be so very plain a case, that in the King's Bench the plaintiff's own counsel would not ask a special verdict.

That the words [heirs male] must be intended heirs male of the body, and would never extend to an heir male of any collateral line; and it not being said in the will, *heir male of his body*, or *of his name*, the grandaughter, who was his heir at law, might have an heir male, though not of his name.

As to the case of *Brown* and *Barkham*, that was merely of a trust; but the principal case is that of a legal estate, where the rule of law, that has so long prevailed, and been taken for granted, must be observed, (viz.) that he, who claims as heir male by purchase, must be heir, as well as heir male.

Besides, this differed from the case of *Brown* and *Barkham*, the remainder being there limited to the heirs male of the body of Sir *Robert Barkham* the grandfather; whereas here the devise was to the heirs male, without saying of any body; wherefore allow the demurrer (2).

(1) 3 Salk. 336. 11 Mod. 189.

(2) This case was again brought before the court in *Gwynn* v. *Hooke*, 18th November, 1740, when Lord *Hardwicke* directed a case for the opinion of the court of K. B. (Reg. Lib. A. 1740. fol. 310.) who certified in confirmation of Lord *Macclesfield*'s order, 8 Vin. 317, pl. 13. note, and that certificate was afterwards confirmed, and the bill dismissed with costs, Reg. Lib. A. 1741. fol. 646. But in *Wills* v. *Palmer*, 5 Burr. 2615. on a case sent to the court of K.B. by the court of Chancery, the question arose on both a will and a deed, whether *A.* took by purchase under the description of heir male *of the body* of *B.* not being heir general.—*B.* being in the first case the *grantor*, the court certified that *A.* took an estate tail by *descent*, but they added in the certificate that if *a third person* had been the grantor, they should have thought that *A.* would have taken by *purchase* as heir male of the body of *B.*—And they also certified that he *did* so take under the will. (*z*)

(*z*) See *Baker* v. *Wall*, 1 Ld. Raym. 185. *Goodtitle* v. *Burtenshaw*, Fearne, C. R. 570. *Goodtitle* v. *Pugh*, ib. 573. *Cholmondeley* v. *Clinton*, 2 Jac. & W. 107.

CONSTRUCTIONS AND RESOLUTIONS RELATING TO PAPISTS.

CASE 2.

By the statute of the 11 & 12 W. 3. cap. 4. sect. 4. for preventing the growth of popery, it is enacted, "that after the "29th of *September*, 1700, every person educated in or pro- "fessing the popish religion, who shall not, within six months "after their attaining their age of eighteen years, conform, "as therein is mentioned, shall, in respect of himself and her- "self only, and not in respect of his or her heirs, or posterity, "be disabled and made incapable to inherit or take by descent, "devise, or limitation, in possession, reversion, or remainder, "any lands, tenements, or hereditaments, and that during the "life of such person, or until he or she shall conform, the next "of such person's kindred, which shall be a protestant, shall "have and enjoy the said lands, tenements, and hereditaments, "without accounting for the profits thereof; but in case of any "wilful waste committed upon the premises by the next pro- "testant heir, or by any other by his licence or authority, the "said protestant heir shall be liable to answer treble damages "to the person disabled, to be recovered by the person disabled, "against the next protestant heir, his executors or admi- "nistrators.

By stat. 11 & 12 W. 3. A papist is not only disabled from purchasing lands himself, but also from taking either by devise or settlement.(1)

[4]

"Also, after the 10th of *April*, 1700, every papist or "person making profession of the popish religion, shall be "disabled, and incapable to purchase in his name, or in the "name of any person in trust for him, any manors, lands, or "tenements, or profits out of the same, but all such estates, "terms, or interests, shall be void." †

Upon the construction of these two clauses in the great case of *Roper* and *Ratcliffe*, it was decreed for the papist by Lord *Harcourt* (*a*), assisted by the two Chief Justices, the Master of the Rolls, and Mr. Justice *Powel;* (C. J. *Parker strenuè opponente;*) but that decree was afterwards reversed in the House of Lords (2), and it was determined against the papist, (viz.) That a papist above the age of eighteen and a half is not capable of taking lands by a devise; and that the word [purchase] in the latter clause, is used in contradistinction to the

(*a*) Mich. 11 Annæ.

† These clauses are not recited *verbatim* as they stand in the act, but are to the same effect.

(1) But the stat. of 11 & 12 *Will.* 3. is repealed in these respects, by stat. 18 *Geo.* 3. c. 60.

(2) 1 Bro. P. C. 450. 9 Mod. 167, 181. 10 Mod. 230.

Constructions, &c. relating to papists.

word [descent]; notwithstanding it was urged that the expression of [purchased by a papist], especially when the words following, viz. [in his own name, or in the name of another in trust for him], must be intended, where such papist is active, and does something for himself; whereas in case of a devise to him, or settlement upon him, there the person taking is merely passive, and may know nothing of the matter before it is done: however, it is now settled by the House of Peers, that either a devise or settlement to a person professing the popish religion, of above eighteen years and a half, is void, and the person not capable of taking; the act intending utterly to disable the papist of that age to take any new acquisitions, or what was not his ancient inheritance.

In the same case of *Roper* and *Ratcliffe* it was determined, that if lands are devised to be sold in trust, in the first place to pay debts and legacies, and to pay the surplus to *J. S.* a papist, *J. S.* is rendered incapable by the latter clause of this statute to take the surplus, forasmuch as it is a profit arising out of land, and such devisee, by laying down the money, may prevent the sale; and if such contrivances were to prevail, the statute would signify little or nothing; so though this surplus be made payable to a person at a future day, (viz.) at twenty-one or marriage, with a devise over, if the first devisee should die before twenty-one or marriage. (1)

So if land descend to a Roman catholic above the age of eighteen and a half; this being a descent, is not within the latter, but is within the first clause, and such papist shall not be capable of taking, until he doth conform; but he, by the words of the act, is disabled to take in respect of himself only, and not in respect of his heir.

[6] For further particulars on this statute, see the following case.

Case 3.

HILL *versus* FILKIN.

9 Mod. 154. 10 Mod. 481. 536. 2 Eq. Ca. Ab. 621. pl. 3. See the case of Carteret versus Carteret, post. 132.

Anne *Stephenton*, a papist, having a grandaughter *Frances*, about fourteen years, and a grandson *John* about twelve years of age, devised her lands, (being about 70*l.* per ann. in Lincolnshire) and all her personal estate, to three trustees and their heirs, (two of which were papists,) in trust to sell, to pay her debts and legacies, and to pay the surplus to her grandaughter *Frances*, at her age of twenty-one or marriage, if

(1) Vide 1 Atk. 622, as to the grounds of this determination.

such marriage should be with the consent of the two popish trustees; and if the said grandaughter should die before such age of twenty-one, or marry without consent, that then such residue should go, and be paid to the said testatrix's grandson.

HILL *v.* FILKIN. A papist conforming at 18, incapable of taking lands devised to him under that age. Qu.

There was a petition to the late Lord *Cowper* for the educating of this grandaughter under protestant guardians, or at a protestant school; and upon an order made by the court, for her being sent to a protestant school, and the person who had the care of her going with her out of court, and telling her, "he hoped she would be in a little time sensible of the errors "and superstitions of the popish religion;" she thereupon "said, "I turn heretic? I would sooner be torn to pieces by "wild horses."

And now the plaintiff *Hill*, as grandson and heir-at-law, and devisee over of this trust-estate, brought his bill, in order to compel the trustees to execute a conveyance unto him, proving, that he, though educated a papist, was turned protestant, and had conformed. Whereupon the only question was, whether, in regard the grandaughter *Frances*, who was admitted to be a papist at the time of making the devise, and at the death of the testatrix, and also at the time of her marriage; (for she had been married twice, (viz.) once at the *Romish* chapel, being the chapel of the Emperor's resident, and after the manner of the papists, and this was with the consent of the trustees; afterwards she was married in a protestant church, according to the manner of the church of *England;* upon which last marriage, and before her age of eighteen, she conformed, and turned protestant;) whether she was entitled to take the trusts of the real estate? for it was admitted she had a good right to the personal estate. [7]

And for her taking, it was insisted, that the act against the growth of popery, (viz.) the statute of 11 & 12 W. 3. cap. 4. upon which the present question was grounded, had these views, 1*st*, To show a tenderness to infants, whose judgments being immature, and more easily deluded, the prejudice of education, or any weak arguments, might induce them, in their tender years, to embrace the popish religion.

But, 2*dly*, It was said the act did not design that this should be so fatal upon such infants, as for ever to make a forfeiture of their inheritance; but that if such infant papists should, within six months after their respective ages of eighteen, conform, they should be restored to their inheritance; nay, though they had forfeited it, for want of a conformity within six months

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after eighteen, yet still, upon conformity, they should be restored to it.

[8] 3*dly*, That as this statute punished the papists, so, on the other hand, it intended to encourage those who should conform, by inviting them in, upon the prevailing motives of interest, even the restitution of their inheritance; otherwise it must be thought a hard thing in the legislature, that those, who under the age of eighteen, or eighteen and a half, for ever so good a consideration, could not dispose of one foot of their estate, should yet, if through the immaturity of their judgment, they were seduced to the *Romish* religion, forfeit all their inheritance, without being able to retrieve it afterwards by their conformity.

And indeed the first clause, enacting that every papist, or person professing the popish religion, unless they conformed within six months after attaining their age of eighteen, should not be capable of taking by descent, devise or limitation, implied, that if they did so conform, they should be capable of taking by descent, devise or limitation; and, therefore, to make these two clauses, which seemingly confound each other, agree, they must be construed to mean, that all papists, or persons professing the popish religion, should not be capable of taking by descent, devise or limitation, except such papists as should be under eighteen and a half at the time their title accrued to them, and that these should have an opportunity of retrieving their inheritance by conforming.

That an act of parliament was usually construed like a will, according to the intent; and therefore, if one by his will devises all his lands whatsoever, to *J. S.* in fee, and afterwards by the same will devises Blackacre to *J. N.* in fee; this will may seem to be contradictory by devising all to one, and yet
[9] a part to another: however, such seeming contradiction is thus reconciled, (viz.) the testator gives all but Blackacre to *J. S.* and disposes of Blackacre to *J. N.*

Or in the principal case, the two clauses might be thus construed, (viz.) all papists, under eighteen and a half at the time of, &c. and who shall conform, shall by that means be re-intitled to their estates; but such papists as are above that age, and whose conversion it may be to no purpose to expect, these are to be under a total disability: which construction would free the legislature from that imputation of hardship it might otherwise seem to have incurred; and would, at the same time, both punish the papist, and encourage the convert.

Lord Chancellor.—By the words and intent of the latter

clause, the defendant, the grandaughter *Frances*, is disabled to take by purchase; because at the time, (viz.) at the death of the testatrix, she was a person professing the popish religion. HILL *v.* FILKIN.

And as to taking by devise, that is a taking by purchase, as was adjudged by the Lords in the case of *Roper* and (1) *Ratcliffe*, which must not now be disputed.

With respect to the objection, that the words, "every papist, "who shall not conform within six months after eighteen, shall "be disabled to take by descent, devise, or limitation," imply, that if the papist does conform within that age, such person shall be capable to take by descent, devise, or limitation, that seems to be a *non sequitur*: an affirmative clause may imply a negative; but the saying that a papist, unless he does conform, shall not take by devise, does not *necessarily* imply, that if he does conform, he shall take by devise, &c.

[*Qu. autem*, If acts of parliament are not to be construed like wills? and if I devise that *J. S.* shall not have my lands, unless he pays to such a person 100*l.* surely, upon the paying of the 100*l.* he shall have my lands.] [10]

Now these two clauses are agreeable and reconcilable: the first regards old subsisting estates, in respect to which, it lays a temporary disability on such as would have taken them, removeable by conformity. The latter clause disables any person professing the popish religion from taking any new acquisitions by purchase, and (as has been observed before) taking by devise, is taking by purchase; so all persons taking by devise are thereby utterly disabled, if they are persons professing the popish religion, though under eighteen and a half, and being within the latter clause, where there are no words that give them a power of retrieving themselves by conformity, they are for ever barred; they are disabled by the latter clause, and not within the former.

But if the infants are (*a*) so young, as that at the time of the accruing of their title (be it by devise or limitation) by reason of the tenderness of their years, they are incapable of embracing any religion, then they are aided by the first clause, and not otherwise.

(*a*) See the case of Carteret *v.* Carteret, post. 135.

As if a devise be to the child of a Roman catholic of the age of one or two years, such child, by reason of the tenderness of his age, being incapable of professing any religion, shall therefore take within the first clause; but must take care to conform before the age of eighteen and a half; else he forfeits

(1) 1 Bro. P. C. 450. and so *Davers* v. *Dewes*, post. 3 vol. 46.

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[11]

to the next protestant heir; but it being a disability only within the first clause, it is only until he himself conforms, and bars not his heir.

So as to the word [limitation] in the first clause: if in a settlement of an estate, the land be limited to a papist for life, remainder to protestant trustees during his life, to support contingent remainders, remainder to the first son of the papist in tail male, and so to every other son successively: this first son shall take by limitation, because it is to vest in him, upon his birth, and at that time such first son cannot be said to be a person professing the popish, or any other religion: but still he must take care to conform in time, (viz.) before eighteen and a half, else he forfeits; but this forfeiture being only within the first clause, it is but a temporary disability, and only until *he* shall conform, without extending to bar his heir.

But in the principal case, the party, at the time when the estate was to vest in her, was a person professing the popish religion, and therefore within the latter clause, and perpetually disabled to take any thing by purchase, and consequently by devise: that she was a person professing the popish religion is plain, first, by her choosing to be married in the popish manner, in a popish chapel, and more particularly, by her having said, "that sooner than she would be a heretic, she "would be torn to pieces by wild horses."

It is very true, there may be a difficulty attending this opinion; I mean, that of fixing the boundary of time when a person may be said to profess the popish religion; and in such a case, where any doubt appears, it is reasonable that the scale should fall on the infant's side, and in favour of the party who would otherwise suffer; but in the present case, by reason of

[12]

the instances already mentioned, the defendant *Frances* the grandaughter plainly appears to have been a person professing the popish religion, when this estate was to have vested in her, by the death of the testatrix; the consequence of which is, that she is disabled by the second clause, and they who are disabled by the second clause, were never intended to be aided by the first; they are for ever disabled, without a possibility of retrieving themselves by any conformity.

Also it is my opinion, that the first clause in relation to a papist's taking by descent, which is in no sort within the second clause, does extend to those who take by descent, though they be past the age of eighteen and a half at the time when their title accrues, so as to lay them under a temporary disability, (viz.) until they conform.

Then as to equitable circumstances, I cannot see any in favour of the grandaughter; it seems plain, that she, being the elder of the two grandchildren, had given the greater hopes of her being a papist, and for that reason, was preferred to her brother, the heir of the testatrix, which was an hardship upon him, as it was an hardship upon an heir, who is favoured in all courts both of law and equity; on the contrary, it cannot be a hardship, that the grandaughter should lose that estate which was plainly given her as a reward for being a papist, when she is turned protestant; if that be so. HILL *v.* FILKIN.

I own, for my part, I cannot but believe there was some private trust lodged in the trustees, that the grandson should have the estate, if he were a papist; also some secret terms, on this marriage of the grandaughter with *Filkin*, that she should [13] enjoy her religion, &c. else why so much haste to marry a girl of fifteen to one, who, having no estate, could make no settlement upon her? therefore let the bill be amended, and both the trustees, and the defendant *Filkin*, the husband, shall answer to these matters.

And then I will have the assistance of the judges; as was done in the case of *Ratcliffe* and *Roper;* for though the estate in question be small, yet (probably) it is a contrivance of the papists to bring this point to a determination, which in some aspects may seem favourable to them, and has not yet been settled. (1)

And as (I presume) this is intended to be carried elsewhere, for that reason, let it appear with all its circumstances; and in regard both sides pretend great poverty, and this suit may be chargeable, let each party have 40*l.* paid by the trustees out of the profits.†

1. Rus. Myl. 599.

1. Bea. 394.

IVY *versus* GILBERT & al.'

CASE 4.

Preced. in Chan. 583. 2 Eq. Ca. Ab. 644. pl. 16. A trust term for raising daughters' portions if it direct a particular method

ROGER *Pomeroy*, seised in fee of the capital messuage, called *Sandridge*, and lands in *Devonshire*, did, by indenture dated 29th *May*, 1651, and by fine, pursuant to his marriage-articles, settle the premises in question to the use of himself for life, remainder, as to part, to his wife for life, for her jointure, remainder, as to the whole, to the first, &c. sons of the mar-

† This case came on afterwards, (viz. in June 1725,) to be heard upon the amended bill, before Lord Chancellor *King*, who decreed in favour of the defendant, contrary to the opinion of Lord *Macclesfield*.

(1) The clauses of the act upon which these questions arose are repealed by statute 18 George 3. cap. 60.

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riage, in tail male, remainder to trustees for 120 years, for raising portions for daughters of the marriage, on failure of issue male, remainder to himself in fee.

of raising the portions, it implies a negative, that they shall not be raised any other way.

A trust-term to raise portions out of rents, issues, and profits, as well by leasing for three lives or twenty-one years, at the old rent; this extends only to raise the portions by annual profits or by leasing, and not by mortgage or sale; and if the trustee in such trust term, mortgages for the portion, the mortgage is void, when the portion might have been raised by the profits.

* The trust of the term of 120 years for daughters' portions was, that the trustees should raise and pay out of the rents and profits of the premises, as well by leases for one, two, or three lives, or for any number of years determinable thereon, *or* (1) for twenty-one years absolutely, at the old rent, 1500*l.* for daughters' portions, to be paid to the only daughter of the marriage, if but one; and to be divided amongst them, if more than one.

[* 14] There was but one child by the marriage that lived, and that was a daughter, called *Joan*, who married *Humphrey Gilbert*, the defendant *Gilbert's* father; but the portion was not paid on the marriage, nor raised till after the father's death.

Roger Pomeroy, the father, who had made this marriage settlement, and upon which he had reserved the fee to himself, having no son, and having a nephew of his name, *(Hugh Pomeroy,)*

By indentures of lease and release, dated 29th and 30th *May* 1706, settled the reversion in fee, expectant on his own death without issue male, and subject to the term of 120 years, to the use of trustees for ten years, remainder to his nephew *Hugh Pomeroy*, for life, remainder to his first, &c. son in tail male, remainder to *John Gilbert*, son of his daughter *Joan*, for life, remainder to his first, &c. son in tail male, remainder to himself in fee; the trust of the ten years' term was, that in case his son-in-law *Gilbert*, and his wife would release the 1500*l.* portion secured by the 120 years' term, then the trustees of the ten years' term should raise 1900*l.*, (viz.) 1500*l.* of it to be laid out in a purchase of land, for the benefit of the son-in-law and daughter *Joan*, and 400*l.* residue of the 1900*l.* to be paid to his son-in-law himself.

[15]

In *July* 1708, *Roger Pomeroy*, the father, died without issue male, leaving his grandson, the defendant *John Gilbert*,

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(1) In 2 Bro. P. C. 468, where this case is very accurately stated, the word "as" is used instead of "or," but in Reg. Lib. A. 1721, fol. 458. the words are, "upon trust to raise "and pay out of the rents and profits of the said premises, *and by "leasing thereof* for one, two, or "three lives, &c. *or* for 21 years."

his executor; but his daughter *Joan*'s portion had not been yet paid, though she had been long married.

Upon the death of *Roger Pomeroy*, the father, his nephew *Hugh*, entered, by virtue of his estate for life given by the voluntary settlement, subject to the 120 years' term for daughters' portions, but for four years afterwards the daughter's portion was unpaid, and the said *Hugh Pomeroy* all the while in possession.

In 1712, application was made by the family to the plaintiff's father to advance the 1500*l.*, being the daughter *Joan*'s portion, on the assignment of the trust-term for 120 years, created for the raising thereof, who being advised this was a good title, being an absolute term, advanced the money to the defendant's own father for his mother's portion.

Accordingly, by indenture the 8th *May* 1712, the defendant's father *Humphrey Gilbert*, and his mother *Joan*, to whom the portion was due, and who had taken administration to the surviving trustee of the 120 years' term; and the remainderman *Hugh Pomeroy*, the nephew, join in assigning the 120 years' term to the plaintiff's father, *Jonathan Ivy*.

October 1715, *Hugh Pomeroy*, the nephew, who had the remainder for life, subject to the 120 years' term for raising daughters' portions, died without issue male, having enjoyed the [16] premises from the death of his uncle *Roger Pomeroy*, to his own death, and left *Daniel Pomeroy* his executor, but left no assets.

Upon the death of *Hugh Pomeroy*, the nephew, the defendant *John Gilbert*, entered and took the profits; and upon the plaintiff the mortgagee's bringing a bill of foreclosure, the question was, whether by the words of this trust, the portion could be raised by mortgage, or any other way, than by annual profits or leasing?

Objected for the plaintiff, 1*st*, That here was an honest mortgagee, and the term of 120 years a subsisting term in law; that the defendants claimed under a voluntary settlement; and the power to raise the portion being by rents, issues, and profits, the word [profits] when not expressly called *annual* profits, had been frequently understood to signify any profits that the land would yield, either by leasing, selling, or mortgaging.

That the words [as well by leasing, &c.] were only additional, and not restrictive; and if the portion were to be raised only by leasing, then it could not be raised by annual rents until leasing; that to say, all the profits should be applied

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to the portion, during the life of *Hugh Pomeroy*, who was the remainder-man for life, would be a great and undesigned hardship upon *Hugh Pomeroy*, by defeating him of the whole benefit of his estate for life; it would be to starve the tenant for life, and this for the benefit of a remote remainder-man, who was to have nothing, until after the death of the tenant for life without issue male; which was a construction against all rules of equity.

[17] As if one were to devise lands for the payment of debts, and afterwards to *A.* for life, remainder to *B.* in fee; here, though *A.*'s estate would be only after debts paid, yet should he not bear the whole burthen of the debts, in regard, this would entirely defeat the devise as to him, which would be to destroy part of the will.

But especially it would be harder in this case, considering *Roger Pomeroy*'s chief regard seemed to have been for his kinsman *Hugh Pomeroy*, who was both of his name and blood, and who might well be thought to have been named by him first in the will, with an intention of preferring him to the persons to whom the subsequent limitations were made: and as this would be a hardship on the tenant for life to pay it out of the profits, so, on the other hand, it would be prejudicial to the daughter to receive that portion by dribblets, which ought to be advanced at once, and in a gross sum, on her marriage.

2*dly*, It was observed, that a child claiming a portion, was favoured in equity, even as much almost as a creditor; nay, that here the daughter was actually a purchaser of her portion, it being in consideration of a marriage, and the mother's portion; and, therefore, if the words would any ways bear it, the court should assist it with the most favourable construction; consequently, as the word [profits] would extend to a mortgage, it should be taken in that sense; and the rather, where the next limitation in the settlement to the term for securing the portion, was a remainder in fee to the heirs-at-law of *Roger Pomeroy*, who made the settlement; and if on the death of *Roger Pomeroy*, the heir had entered and taken the profits, these profits so taken by the heir-at-law, would never have

[18] gone in discharge of the portion; that if the heir-at-law could never have defended himself against the daughter, to whom the portion was due, so neither could the persons under the second settlement; forasmuch as they claimed under the limitation to the heir-at-law.

3*dly*, It was insisted, that the sense was imperfect: (viz.) the trust of the term of 120 years, was to raise the portion out

of the rents, issues, and profits, *as well* by leasing the premises, for one, two, or three lives, or for any number of years, determinable on one, two, or three lives, or for twenty-one years absolutely, reserving the ancient rent; so that there was nothing to answer these words [as well], no correlative. (1)

Now, the words understood might be to raise the portions by rents and profits, as well [as] by leasing, and the words [as well as by leasing] being usually inserted in cases of *Western* estates, where fines are commonly raised by leasing, the same might here have been used *in majorem cautelam*, to empower the trustees to make leases, notwithstanding that the general word, viz. [profits] included that power; and it was common to say, in those kind of settlements, in trust to raise the portion by rents, issues, and profits, or by sale, lease, or mortgage, though all this had been before implied by the word [profits].

Lastly, It was represented as very hard for a court of equity to decree the loss of an honest debt, in a case where such debt would be safe at law, and to put the mortgagee to follow the personal assets of *Hugh Pomeroy*, the remainder-man, for the payment of his debts; especially when the executor of *Hugh*, who was made a party to the suit, has denied assets; and as to the subsequent settlement, this could not alter or prejudice [19] the former security, made by the first settlement for the portion.

Lord Chancellor.—It will be very material to know the yearly value of the premises charged with this portion, in order to see within what time the portion could be raised; though it seems as if the second settlement made by *Roger Pomeroy* having created a term of ten years only of the premises for securing 1900*l*. the parties thought that the same would, in a reasonable time, be a proper fund or security for the raising of this lesser portion of 1500*l*.

I take it to be a rule, that where a trust of a term for raising portions for daughters, does direct a particular method for raising them, it implies a negative, that they shall not be raised any other way; and when the trust of the term, in the present case, is to raise the portion, by leasing for one, two, or three lives, or for any term of years, determinable upon one, two, or three lives, or for twenty-one years absolutely, it shall not be raised by any other way; and it is considerable, that even by this way, (viz.) of leasing, it could not be raised, but by making such leases upon which the old rent was reserved.

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(1) Vide ante, p. 14.

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The natural meaning of the word "profits," is annual profits, though for necessity, in some cases, it has been construed to extend to any profits that can be made by sale or mortgage.

The natural meaning of raising a portion by rents, issues, and profits, is by the yearly profits; but to prevent an inconvenience, the word [profits] has, in some (*a*) particular instances, been extended to any profits which the land will yield, either by sale or mortgage; but where there are subsequent words to explain and restrain it, as by leasing, I have not heard of any case which has said, that any other method shall be made use of for the raising of it. (1)

(*a*) Vide the case of Trafford *v.* Ashton, vol. 1. 418.

[20]

It is as much the intent of the settlement to confine the manner of raising this portion to leasing, as to secure any portion at all; and consequently it would be a plain breach of trust to raise it any other way.

And at the time of making this settlement, (which was in 1657,) I do not think that the word [profits] was extended to signify the profits which might be made of land by sale or mortgage.

Here is no time appointed for the raising of this portion; and, therefore, the portion in this case is due, when the (*b*) profits can raise it; and it carries no interest; but when the sum of 1500*l.* is, or might have been raised by the profits, then it becomes due, and the land is discharged, as having borne its burden.

(*b*) See for this in the case of Evelyn *v.* Evelyn, post. 666.

Where a portion is to be raised by annual profits or fines, if no time be appointed, the portion is not due, till such time as it might be so raised.

The profits received by *Hugh Pomeroy*, are as received by the mortgagee *Ivy*, because it is said in the last clause in the mortgage-deed, that it should be lawful for *Hugh Pomeroy* to take the profits without account, until default of payment; so that he, by this clause, is tenant at will to the mortgagee, which makes it to be the same thing, as if the mortgagee had let it to any other person; therefore this mortgage made to the plaintiff is not pursuant to the trust, and so much of the profits, as have been received, must go towards the payment and sinking of the portion; only here having been a power of leasing, and the intention having been to charge the land as far as may be,

Let the Master see how far the land might have been charged by leasing, and whether any lives were vacant, and reserve

[21]

the consideration, how far the estate shall be chargeable there-

(1) So *Evelyn* v. *Evelyn*, post. 666. *Mills* v. *Banks*, post. 3 vol. 8. *Okeden* v. *Okeden*, 1 Atk. 550. *Small* v. *Wing*, 3. Bro. P. C. 503. *Gibson* v. *Rogers* Amb. 95.

by; and let the representative of *Hugh Pomeroy* pay the mortgage money and interest, as far as the assets will extend.

This decree was afterwards affirmed in the House of Lords, though thought a very hard case (1).

HARVEY *versus* HARVEY.

CASE 5.

At the Rolls.

2 Eq. Ca. Ab. 566. pl. 10. A father gives a legacy to an infant payable at twenty-one; in what case, and in what manner the Court will allow maintenance to the infant out of the legacy, before it is due.

ONE seised of a real estate, and possessed of a personal estate, and having several children, devises all his real and personal estate to his eldest son, charging the same with 1000*l.* a-piece to all his younger children, payable at their respective ages of twenty-one, but in the will no notice is taken of maintenance for the younger children in the mean time.

The younger children bring their bill in order to recover interest, or some maintenance during their infancy.

Upon which, the Master of the Rolls, having taken time to consider of the case, and having been also attended with precedents, decreed, that the younger children should recover maintenance.

His Honour observed, that these being vested legacies, and no devise over, it would be extreme hard that the children should starve, when entitled to so considerable legacies, for the sake of their executors or administrators, who, in case of their deaths, would have the said legacies.

That in this case, the Court would do what, in common presumption, the father, if living, would, nay, ought to have done, which was, to provide necessaries for his children. [22]

That a court of equity would make hard shifts for the provision of children: as where younger children were left destitute, and the eldest an infant, equity would make such a liberal (2) allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children; and for the same reason, the Court would likewise take a latitude in this case; that since interest was pretty much in the breast of the

(1) 2 Bro. P. C. 468.

(2) *Pierpoint* v. *Lord Cheney*, ante, 1 vol. 493. *Lanoy* v. *Duke of Athol*, 2 Atk. 447. *Petre* v. *Petre*, 3 Atk. 511 (*z*).

(*z*) *Tweddell* v. *Tweddell*, 1 Turner, 13. And the Court has even allowed a larger maintenance in respect of an illegitimate brother of the infant by the same father and mother. *Bradshaw* v. *Bradshaw*, 1 J. and W. 647.

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Court, though the will were silent with regard to that, yet it should be presumed that the father who gave these legacies intended they should carry interest, if the estate would bear it; for every one must suppose it to have been the intention of the father, that his children should not want bread during their infancy (1).

Nay, that for this reason it had been held, that though a legacy were devised over in case of the legatee's dying before twenty-one, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance, with this difference only, that where the estate has appeared to be small, the Court, in whose discretion it always lies to determine the *quantum* of interest, has ordered the lower interest.

The Court cited 1 Chan. Rep. 8vo. 265, *Glyde* versus *Wright*, 1 Chan. Cases, 60. *Rennesey* versus *Parrot*, 1 Chan. Cases, 249. *Leech* versus *Leech;* where a distinction was

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(1) So *Attorney-General* v. *Thompson*, Pre. Cha. 337. *Green* v. *Belcher*, 1 Atk. 507. *Haughton* v. *Harrison*, 2 Atk. 330. *Heath* v. *Perry*, 3 Atk. 101. *Hearle* v. *Greenbank*, 3 Atk. 716. *Incledon* v. *Northcote*, 3 Atk. 438 (*y*).

(*y*) The general rule is, that where a legacy is given, payable at a particular time, and the Will gives no Directions as to Interest, interest shall be given only from that time. The cases excepted are, where the legacy is a residue, as to which see *Nicholls* v. *Osborne*, post. 419; and where the legatee, being the child of the testator, *Crickett* v. *Dolby*, 3 Ves. 10. *Tyrrell* v. *Tyrrell*, 4 Ves. 1. *Chambers* v. *Goldwin*, 11 Ves. 1. *Pett* v. *Fellows*, 1 Swan. 561. n., or a person to whom the testator has put himself in *loco parentis*, *Beckford* v. *Tobin*, 1 Vez. 308. *Hill* v. *Hill*, 3 V. & B. 186, is an infant, *Raven* v. *Waite*, 1 Swan. 553, and has no maintenance provided for him by the will, *Mitchell* v. *Bower*, 3 Ves. 287. *Long* v. *Long*, ib. n. *Wynch* v. *Wynch*, 1 Cox, 433: and in these cases interest shall be given from the death of the testator, as a maintenance for the legatee. *Mole* v. *Mole*, 1 Dick. 310. *Cary* v. *Askew*, 1 Cox, 241. A wife is not excepted, nor a grandchild, or natural child, as such. *Coleman* v. *Seymour*, 1 Vez. 209. *Demazar* v. *Pybus*, 4 Ves. 647. *Perry* v. *Whitehead*, 6 Ves. 544. *Ellis* v. *Ellis*, 1 Sch. & L. 1. *Stent* v. *Robinson*, 12 Ves. 461. *Lowndes* v. *Lowndes*, 15 Ves. 301.

Where a legacy is made payable with interest, on the legatee attaining 21, &c., and bequeathed over in the event of his dying under age, and the testator has not directed maintenance, the Court will give it, *even though the interest was directed by the will to accumulate*, if the testator was the father of the legatee, *Mole* v. *Mole*, ub. sup. *Stretch* v. *Watkins*, 1 Madd. 253. or if the legatee over consents; or if the legacy is given to a class of infants, with benefit of survivorship, and no ulterior devise over; but not otherwise. *Greenwell* v. *Greenwell*, 5 Ves. 194. *Fairman* v. *Green*, 10 Ves. 45. *Lomax* v. *Lomax*, 11 Ves. 48. *Ex parte Kebble*, ib. 604. *Errington* v. *Chapman*, 12 Ves. 20. *Errat* v. *Barlow*, 14 Ves. 202. *Marshall* v. *Holloway*, 2 Swan. 436. *Haley* v. *Bannister*, 4 Madd. 275.

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taken between a vested legacy, and a legacy devised over, (viz.) in the former case, to allow a maintenance though the legacy was not payable, but to give no maintenance where the legacy was devised over; and his Honour said, that of late it had been the practice to allow maintenance even in case of legacies that were not vested; also he cited 2 Vent. 346. *Bourne* versus (1) *Tynte*, (though the name does not there appear,) a strong case of interest being allowed for an infant's legacy, before the same became payable.

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But it seems, that if one, not a parent, gives a legacy to an infant, payable at twenty-one, without any devise over, and the infant has nothing else to subsist on, the Court will order part of this legacy, in order to provide bread for the infant, to be paid, presently, allowing interest for the same to the person paying it, out of the remaining principal; though this is done very sparingly. (*z*)

ATTORNEY-GENERAL *versus* ROBINS.

CASE 6.

At the Rolls.

One by will gives several legacies, and afterwards in the same will, apprehending that there will be a surplus, therefore gives further legacies; the legacies in the former part of the will shall have preference in case of a deficiency.

ONE *Robins*, a clergyman, having some personal estate, and about 400*l.* of it in South-Sea Stock, which, at the time of the making of his will, (viz. in *June* 1720,) was valued at about 1000*l.* per cent., made his will, and thereby gave 60*l.* a-piece to his executors, for their care and pains, and 3*l.* a-piece to the poor of three several parishes, and 5*l.* a-piece to his servants, besides several other charities; and at the latter end of his will said, that he apprehended there would be a considerable surplus of his personal estate beyond what he had before given away in legacies, for which reason he gave several further legacies.

One makes a will, then a codicil, and gives legacies by both; on a deficiency they shall all come into average.

After this, the testator made a codicil, whereby he gave several other legacies, amounting in all to 160*l.* and then provided in his codicil, that in case there should be any deficiency, then 200*l.* which the testator had given by his will for re-building a chapel for St. John's College in Cambridge, should not take effect, saving only, that as much as should be

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(1) As to the case of *Bourne* v. *Tynte*, vide *Acherley* v. *Wheeler*, ante, 1 vol. 786, *Heath* v. *Perry*, 3 Atk. 102.

(*z*) Vide *Walker* v. *Wetherell*, 6 Ves. 474. *Beasley* v. *Magrath*, 2 Sch. & L. 35. *Ex parte Darlington*, 1 Ba. & Be. 240. *Ex parte M'Key*, ib. 405. *Ex parte Green*, 1 Jac. & W. 253.

ATTORNEY-GENERAL *v.* ROBINS.

thought necessary for that purpose, should be laid out in beautifying the old chapel there, and soon afterwards the testator died.

There happened to be a great deficiency, by reason of the fall of the value of South-Sea Stock, which the testator had computed at 1000*l.* per cent.

Upon which it was decreed by the Master of the Rolls, that the legacies given at the latter end of the will being upon a presumption that there would be a surplus, and there happening to be no surplus, the former legacies in the will should have a preference, and those legacies given in the latter end of the will should be lost.

However, as to the legacies given by the codicil, it was objected, that a codicil was as a latter will, which should prevail over a former, and therefore the legacies in the codicil ought to be preferred to the legacies in the will.

Sed per Cur': The codicil must be taken as part of the will, so that if there be a deficiency to pay both all the legacies in the will, and likewise those in the codicil, constant experience shews, that there shall be an abatement in proportion; but here, when the testator in the latter end of his will said, that in regard he apprehended there was a considerable surplus, therefore he gave additional legacies, the same apprehension of a surplus must be intended to continue in the testator at the time of his making his codicil, and the legacies in the codicil should take place only out of the supposed surplus, were it not for the latter part of the codicil, (viz.) that the legacies in the codicil, should be paid out of the 200*l.* given for the

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re-building of the chapel, and out of the remainder of what might be thought necessary to be laid out in beautifying the old chapel.

In case of a deficiency, charity-legacies, as well as others shall abate in proportion; but three pounds to the poor of the parish, shall be taken as part of funerals, and so no abatement.

Also, though 'twas objected that the charity-legacies should be preferred to the other legacies, yet it was decreed, and said to have been formerly so ruled, (*a*) that charity-legacies, being but legacies, must, on a deficiency, abate in proportion, notwithstanding that by the civil law, charity-legacies have the preference to all others.

(*a*) Ante vol. 1. Tate *v.* Austin, 265. Masters *v.* Masters, 421. and Attorney-General *v.* Hudson, 675.

With respect to the 3*l.* given to the poor of three several parishes, these the Court looked upon as part of the funeral, and as *doles* at the funeral; and therefore held, that no abatement ought to be made out of them.

ATTORNEY-GENERAL *v.* ROBINS.

But as to the 5*l.* a-piece given to the servants, though these had been paid by the executors, who desired an allowance on account thereof, yet the Master of the Rolls said, he could not break into the rule, for then there would be no knowing where to stop; wherefore these legacies were to abate in proportion.

60*l.* legacy to an executor, for care and pains, in case of a deficiency, shall abate in proportion.

Lastly, It was urged, that the 60*l.* a-piece given to the executors being said to be for their care and pains, the same became a *debt:* and the executors, *virtute officii*, being entitled to a preference, might pay such their own debt first.

Sed per Cur': The executors, if they please, may renounce; and the legacies to them are but legacies, and shall abate in proportion: (1) it cannot be a debt, in regard that can never be a debt to the executors, that was not so to the testator.

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(1) So *Fretwell* v. *Stacy*, 2 Vern. 434. *Anon.* 2 Atk. 171. (*z*)

(*z*) See *Dyose* v. *Dyose*, ante, 1 vol. 463. *Beeston* v. *Booth*, 4 Madd. 161. 305. *Page* v. *Leapingwell*, 18 Ves.

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TERM. S. TRINITATIS, 1722.

MAXWELL *versus* WETTENHALL. (1)

Case 7. Lord Maccleſfield.

2 Eq. Ca. Ab. 238. pl. 11. 531. pl. 12. 573. pl. 5. Where & from what time a legacy shall carry interest. If a legacy be given out of land, it carries interest from the death of the testator, because land yields profits.

In this case the following points were resolved:

1*st*, If one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time. (*z*)

If out of personal estate, it yields interest from a year after testator's death; but if a time of payment be mentioned, then interest from that time.

2*dly*, But if a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year, after the death of the testator; and Lord Chancellor, upon a debate from what time interest should commence, said, that he took this to be the settled difference. (2)

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(1) Reg. Lib. B. 1721. fol. 480. "The special matter of the master's "report made in this cause coming on "to be heard, the question thereon "being, whether any interest, and from "what time, shall be paid for certain "legacies given by the will of the said "testator *G. Wood*, and the counsel "for the said legatees insisting, that "the said legacies having been charged "on the real estate in question, there "hath been raised by the rents and "profits, and by the sale of the said "estate, and by other parts of the "fund by the decree appointed to be "applied in payment of the said tes-"tator's legacies, not only sufficient "for the payment thereof, but that it "appears by the said master's report, "that there will be remaining in his "hands the sum of 1851*l.* and that they "ought thereout to be paid interest "for their respective legacies from the "time of the death of the said testator, "His lordship declared that it should "be referred back to the master to "compute interest on the several lega-"cies at 5*l.* per cent. (*y*) from the "time of the death of the said testator "to the time the said purchase-money "was brought before the said master, "from which time they are to have "their proportion of the interest which "has been made thereon."

(2) So *Lloyd* v. *Williams*, 2 Atk. 108. *Beckford* v. *Tobin*, 1 Vez. 308. *Bilson* v. *Saunders*, Bunb. 240. Et vide *Stonehouse* v. *Evelyn*, post, 3 vol. 253. (*x*)

(*z*) *Spurway* v. *Glynn*, 9 Ves. 483. *Shirt* v. *Westby*, 16 Ves. 393. *Davies* v. *Davies*, Dan. 84. *Pearson* v. *Pearson*, 1 Sch. & L. 11.

(*y*) But now only 4 per cent. is allowed. *Shirt* v. *Westby*, ub. sup.

(*x*) *Sitwell* v. *Barnard*, 6 Ves. 520, *Gibson* v. *Bott*, 7 Ves. 89. *Webster*

MAXWELL *v.* WETTENHALL.

3dly, If a legacy be given charged upon a dry reversion, here it shall carry interest only from a year * after the death of the testator, a year being a convenient time for a sale. (*z*)

If a legacy be given only out of a reversion or remainder, it shall not yield interest but from the end of the year.

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4thly, If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, it seems, in this case, the legacy shall carry interest from the death of the testator. (*y*)

If out of a personal estate, consisting of mortgages, or funds carrying interest, then it shall carry interest from the death of the testator.

5thly, If a legacy be brought into court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the money was brought into court; but if the money was put out, the legatee shall have the interest, which the money put out by the court did yield.

If a legacy be brought into court, legatee shall lose the interest while the legacy remains in court but if the legacy is by the court placed out at interest, legatee to have such interest.

6thly, A legatee or creditor coming in before the master, and not party to the cause, shall have his costs; (*x*) for it was in his power to have brought a bill for his legacy, or debt, which would have put the estate to further charge.

Legatee or creditor coming in before a master for his legacy or debt, shall have his costs.

7thly, Lord Chancellor said, that 'twas the daily practice, if a man devised his lands for the payment of his debts, this devise makes the land as a security or mortgage for all the testator's debts, as well those by simple contract, as otherwise, and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits. (1)

If one by will charge his land with the payment of his debts, this is like a mortgage for his debts, and will make the simple contract debts carry interest.

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(1) Sed contrà, *Barwell* v. *Parker*, 2 Vez. 363. *Earl of Bath* v. *Earl of Bradford*, 2 Vez. 587. *Shirley* v. *Earl Ferrers*, 1 Bro. C. C. 41. et vide *Car* v. *Countess of Burlington*, ante 1 vol. 228. (*w*)

v. *Hale*, 8 Ves. 410. *Wood* v. *Penoyre*, 13 Ves. 333. *Benson* v. *Maude*, 6 Madd. 15. Unless given by a parent to a child, &c. as to which see *Harvey* v. *Harvey*, ante 21; or where it is decreed by the court to be in satisfaction of a debt, *Clark* v. *Sewell*, 3 Atk. 99. The first payment of an annuity is due at the end of a year from the testator's death, *Gibson* v. *Bott*, ub. sup. or at the end of a month, &c. if directed by the will to be paid monthly, &c. *Houghton* v. *Franklin*, 1 S. & S. 390.

(*z*) But in *Davies* v. *Davies*, Dan. 84, interest was given from the testator's death.

(*y*) Contra *Pearson* v. *Pearson*, 1 Sch. & L. 11. *Gibson* v. *Bott*, 7 Ves. 97. *Webster* v. *Hale*, 8 Ves. 412. But if a *specific fund* be bequeathed, the legatee shall have it with its produce. *Barrington* v. *Tristram*, 6 Ves. 345. *Raven* v. *Waite*, 1 Swan. 553.

(*x*) Contra, as to a creditor, *Abell* v. *Screech*, 10 Ves. 355. *Watkins* v. *Maule*, Jacob, 105. and see *Harvey* v. *Harvey*, and *Waite* v. *Waite*, 6 Madd. 91, 110.

(*w*) *Creuze* v. *Lowth*, 4 Bro. C. C. 157, 317. 2 Ves. jun. 157. S. C. nom. *Creuze* v. *Hunter*. *Tait* v. *Ld. Northwick*, 4 Ves. 816. A charge by will of the debt of another person, being considered as a legacy, will carry interest as such. *Shirt* v. *Westby*, 16 Ves. 393.

GORE *versus* GORE. B. R.

CASE 8.

(Argument for *Edward Gore* the plaintiff.)

9 Mod. 4.
2 Kel. 254.
Barnard, K. B. 209. 229. 355.
2 Stra. 958.
10 Mod. 501.

THIS case came on before Lord Chancellor *Macclesfield*, who directed it to be referred to the Judges of the King's Bench for their opinion.

2 Eq. Ca. Ab. 339. pl. 12. *A.* seised in fee has two sons *B.* and *C.* both unmarried, and devises his land to trustees for 500 years, in trust to pay 50 *l.* per annum to his eldest son *B.* for life with power of distress, and on several other trusts, (some of which are remote), remainder to the first, and every other son of *B.* in tail, remainder to *C.* the second son for life, remainder to his first, &c. son in tail, remainder over. By the better opinion, this a good executory devise to the first son of *B.*

The testator *William Gore* had several sons, *Thomas* and *Edward Gore*, &c. and several daughters; and being seised in fee of divers manors and lands, did, by his will, dated 14th *July* 1718, devise these lands, &c. to trustees for 500 years, and after the determination of that term, to the first son of his eldest son *Thomas* (who was then a bachelor) to be begotten in tail male, and so to every other son of the body of *Thomas* to be begotten in tail male successively;

Remainder to the testator's second son *Edward* for life, remainder to his first, &c. son in tail male successively, with divers remainders over.

The trust of the term of 500 years was, to pay the testator's debts and legacies, which were considerable, and likewise to pay 50*l.* per annum annuity to the testator's eldest son for his life, with a power for his said eldest son to distrain for the same, if in arrear, with a power to the testator's younger son *Edward* to charge the premises with 1000*l.* a-piece for his younger sons or daughters, payable at twenty-one, and with a maintenance for them in the mean time, not exceeding the
[29] interest of their portions; the trustees to raise such portions, and maintenance out of the term for 500 years, and when all the trusts of the term were performed, then the term to attend the inheritance.

Also the testator declared, that the reason why he gave his eldest son *Thomas* no more than 50*l.* per annum, was, because his said eldest son had stood him in a great deal of money, and was to have 400*l.* per annum, in lands in *Wiltshire*, immediately after his (the testator's) death.

In the *February* following the testator died, leaving his eldest son *Thomas* then a bachelor, who afterwards married, and had a son.

The first question was, whether the devise to the first son of *Thomas* (the testator's eldest son) was good?

2*dly*, In whom the freehold of the premises did vest at the death of the testator?

And I argued before the judges, in behalf of the younger son *Edward Gore*.

As to the points in question, the case may be put in very few words, and is but this:

The testator *William Gore* seised in fee of the premises in question, devises them to trustees and their heirs, to the use of the said trustees for 500 years, upon several trusts yet subsisting, and likely long to continue, and from and after the determination of that estate, then to the use of the first and every other son to be begotten of the body of the testator's eldest son *Thomas Gore*, in tail male successively, remainder to the use of the testator's second son *Edward Gore* for his life, with remainders over. The testator dies, and at his death, his eldest son *Thomas* had no son, but afterwards the testator's eldest son *Thomas* has a son, † (the now defendant *William Gore*,) upon which the question is, whether this son of *Thomas Gore*, born after the testator's death, be entitled to the premises?

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And I humbly take it, that the son of *Thomas Gore*, born after the death of the testator, is not entitled to the premises in question.

I cannot say, nor can the other side insist, that at the time when the testator *William Gore* made his will, whereby he devised the premises to trustees for 500 years, remainder to the first son of the body of his eldest son *Thomas Gore*, to be begotten in tail male, that the devise over of this remainder, to such first son of *Thomas Gore*, was in all events, void at the time of the making this will. No; by possibility it might have been a good devise: it might have been a good devise, even by way of remainder, because it was at the time of making the will, possible, that this *Thomas Gore*, the testator's eldest son, might have a son born after the making the will, and before the testator's death; and though this may in some respects, be said to be no will until the death of the testator, yet after the death of the testator, in case of a devise of land, (which is the present case,) a will, in many respects, relates to the (*a*) time of the making; and therefore if I devise all my lands, and afterwards purchase more lands, this will so far relates to the time of making it, as not to pass the after-purchased lands; nay, though the

(*a*) Vide vol. 1. 97. Lord Bindon v. Earl of Suffolk, and Wind v. Albone, 575.

† *Wm. Gore* is mentioned improperly in this place, his birth having happened some time afterwards, (vide post. 64.) and occasioned the reporter's arguing the case a second time in *B. R.* The reader will perceive this mistake has arisen by transcribing the case as stated in the second argument.

GORE v. GORE. testator signifies his express intention that his after-purchased lands should pass; or if the testator devises all the lands which he shall die seised of, yet this will not pass lands purchased
[31] subsequent to the making of the will; as was adjudged in this court in the case of *Bunter* and *Cook*. 1 *Salkeld*, 237.

It is true, it is shewn in this case, that the will is dated the 14th of *July*, 1718, and that the testator's son *Thomas Gore* was then a bachelor, and that the testator died in *February* following; yet as it is wholly uncertain, when any person living is to die, so at the time when the testator made this will, it was then wholly uncertain how long afterwards the testator might live. It could not be then known but that the testator might live so long after the making the will, as that his eldest son *Thomas Gore* might have a son born in the said testator's lifetime, and the subsequent event, or what happened afterwards, will not alter what the law was at the time of making this will.

Then I would suppose, that after the making this will, the testator's eldest son *Thomas Gore* had had a son born in the life of the testator, how would this son have taken, whether by way of remainder expectant upon this 500 years term, or by way of executory devise?

Plainly such son would have taken by way of remainder, and not by way of executory devise; for then the case would have been but this: the testator devises lands to trustees for 500 years, remainder to the first son of the testator's eldest son *Thomas Gore* to be begotten in tail male, remainder to the testator's second son *Edward Gore* for his life, and *Thomas Gore*, the testator's eldest son, has no son born at the time of making the will, but afterwards (and in the lifetime of the testator) has a son, and then the testator dies; it seems there can be no doubt, but that this son of *Thomas Gore*, born after
[32] the making the will, and in the lifetime of the testator, would have been entitled to the premises, and would have taken by way of remainder, and not by way of executory devise.

Wherefore, since in the present case it was possible, at the time of making this will, that the devise over of the premises to the first son of *Thomas Gore*, might have taken effect by way of remainder, by the birth of a son in the lifetime of the said testator, and after the making the said will; and since it is laid down as a rule, in the case of *Purefoy* and *Rogers*, (2 *Saund.* 388,) that where a devise might ever take effect as a contingent remainder, in such case, it shall not operate as an executory devise; if, where a devise over might operate but as a *contingent* remainder, which is but a precarious estate, and

at the mercy of the tenant for life to destroy when he pleases, I say, if even in that case the devise over shall not take effect as an executory devise, I submit it to your Lordships, whether the present case is not within that rule, and to receive the like construction. GORE v. GORE.

But, for argument sake, taking this point to be against me, still the principal case is for me.

First, I may take this for granted, that in the present case, where the devise is to the trustees only for 500 years, with remainder to the first son of *Thomas Gore* to be begotten in tail male, and *Thomas Gore* has no son born in the life of the testator:

That this remainder cannot operate as a contingent remainder, because there is no freehold to support it, and that therefore, as a contingent remainder, this is void.

So that the only way to make good this devise over to the first son of *Thomas Gore*, must be to construe it an executory devise. [33]

And in favour of this construction, it has been much insisted upon, that in the devise over to the first son of *Thomas Gore to be* begotten, these words [to be begotten] import a future and executory devise, and make the case different from what it would have been, if such devise over had been to the first son of *Thomas Gore begotten.*

Now the words *begotten* and *to be begotten, procreatis* and *procreandis*, have been always held to be the very (*a*) same, as is expressly said in 1 *Inst.* 20. *b.*

(*a*) Vide vol. I. 427. Hewit *v.* Ireland, and Long *v.* Beaumont, 231.

And though it may be objected, that admitting the words *begotten* and *to be begotten*, may be the same in case of a deed, yet that it will be otherwise in case of a will, which is the present case:

Yet that these words are exactly the same, in case of a will, as in the case of a deed, has been determined in the court of chancery. 2 *Vern.* 545. *Cook* versus *Cook*, *Paschæ* 1700. Where the devise being to the issue of *J. S.* begotten, the then Lord Keeper, in the determination of that cause, declared, that the words *begotten*, or *to be begotten*, make no manner of difference, but are the same, as well in construction of wills, as settlements, and take in all the issue afterwards begotten.

In the present case, where the devise is to the first son of *Thomas Gore* to be begotten, suppose *Thomas Gore* had had a son born before the making of this will, and never had any other child: surely, according to these authorities, such son, though born before the making of the will, would have taken the premises, and that by virtue of the words *to be begotten.* [34]

GORE *v.* GORE. I would beg leave to put this case a little further:

Suppose the testator had one son born before the making of the will, and had devised his lands to his first son *to be* begotten, and then had a son born after the making of the will, which of these two sons should take?

Why surely the eldest son, and that by virtue of the devise to the testator's first son *to be begotten*, though he was born before the will.

And if this be so, it is a demonstration, that the words *begotten* and *to be begotten* are the very same.

Accordingly as they have been, and are, frequently used promiscuously in most deeds or wills, where an estate tail is created, and are now become almost technical words:

It might be at this time of day of dangerous consequence, to put upon them a new and different construction from that which the uniform resolutions, as well of the courts of law, as equity, have agreed to give them.

But, for argument sake, taking this point to be also against me,

Still I humbly insist, that the devise in the principal case, being to the trustees for 500 years, and from and after the determination of that estate, to the first son of the body of *Thomas Gore* to be begotten, this devise over to the first son of *Thomas Gore* in tail, cannot be good by way of executory devise, for these reasons:

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First, Because the devise over to the first son of *Thomas Gore* to be begotten, is not limited to take effect within the compass of time which the law allows for that purpose; for though *Thomas Gore* had a son afterwards, yet that son does not take a legal and alienable estate, until the precedent term of 500 years is determined.

And in the next place, this devise over to the first son of *Thomas Gore* to be begotten in tail, and which is expectant only on a term for years devised to the trustees, cannot be good as an executory devise, because the freehold of the premises cannot, in this case, descend to the heir at law of the testator, there to wait, until the executory devise takes effect, without which such executory devise cannot be good.

Now I say, the freehold, in this case, cannot descend to the testator's heir at law, because it is devised over by this will from the heir at law, to several persons in *esse* for their lives successively.

Thirdly, Another reason, why this devise over to the first son of *Thomas Gore* to be begotten cannot operate as an executory devise, is, because it is devised to this first son

as a remainder, and therefore cannot take effect as an executory devise. GORE v. GORE.

First, Then I take it, that this devise being to trustees for 500 years, and afterwards to the first son of *Thomas Gore* to be begotten in tail male, the same is too remote a devise over to take effect as an executory devise.

And here I would not enter into that large field of learning of executory devises; I would not trace out their original, when they began, nor would I examine into the progress they have made; only this I may say, they obtained from the court their first commencement not without great difficulty; and as to their progress, it has not been allowed without great reluctancy, hardly without continual entries of protestations, (if I may be permitted to say so) that the court would not go one jot further than the former resolutions had carried them, and had almost repented of having gone so far. [36]

I would just beg leave to mention some expressions made use of by Lord Chief Justice *Treby*, in the delivering of his opinion in the case of *Scattergood* and *Edge*, " (a) that his Lordship " had observed these executory devises had introduced many " intricate questions not known to the plainness of the common " law; that for this reason he would be always against the least " enlargement of that time, to which former resolutions had " confined them, and that he would do nothing in favour of so " inconvenient an estate." (a) Vide Salk. 230.

So that I take it for granted, if it can be made appear, that the allowing of this executory devise will be to carry it any thing farther than has been yet done, this alone will be a sufficient argument against it.

Having said thus much, I would not repeat what the learned † counsel on my side insisted upon in his argument, " that " every executory devise must be confined to one or more " concurrent life or lives, or else it would be void; and that " this executory devise might exceed that time, in regard " *Thomas Gore* might die without a son, and leave his wife " *privement ensient* with a son, who might be born nine or " ten months after the death of his father *Thomas*;" it would be tedious, and take up too much of your lordships' time, to repeat those several authorities which he cited, and what he urged upon that head; I take it, that all that can be said, has been said upon that part of the subject, and hope it will have its weight with your lordships. [37]

† Mr. Bootle.

GORE *v.* GORE. What I shall insist upon, is, that this devise being to the use of trustees for 500 years, and from and after the determination of that estate, to the use of the first son to be begotten of the body of *Thomas Gore* in tail male, this devise over to the first son, &c. is a void devise, because it cannot take effect until after the determination of the term of 500 years, and will not vest upon the birth of this first son of *Thomas Gore*, so as to become a legal and transferable estate, until the 500 years term is determined.

But before I come to this point, I would speak a word with regard to this term of 500 years devised to the trustees, and which is limited precedent to the devise over to the first son, &c. As to this term of 500 years, if a court of law were to take notice of the nature of the trusts declared thereof, (which methinks they should not, being a matter merely of equity,) but if a court of law will take notice of trusts in equity, they may see, that the trusts of this term are such, as (for aught appears to the contrary) may last as long as the term itself; the trusts are not only to pay several annuities for lives, but to pay several great debts, and considerable portions to the testator's younger children, with interest, and also additional portions given by the codicil.

[38] But besides this, by the will, the two younger sons of the testator, when they shall be in possession, have a power to charge this 500 years term with portions for their younger children, payable at their ages of twenty-one, and to their daughters at twenty-one or marriage, with maintenance in the mean time, not exceeding the interest of their portions, and the like power for the testator's eldest son to charge the term with portions to his younger children.

So that the children, who are to take these portions to be charged upon this 500 years term, may not be yet born, not born for these many years, and after their birth they are not to receive their portions till twenty-one, neither is there any proviso for making void the term, even upon the payment of all these debts, portions, and annuities.

There is indeed a proviso, that if the person, next in remainder after this term of 500 years, shall, to the good liking of the trustees, secure the payment of these annuities, debts, and portions, then the term shall attend the reversion.

But whether the next person in remainder ever will, or ever can, or ever shall think it worth his while to give such security, does not appear.

Though surely in the case of a trust, and such a trust, so

likely to continue for so very long a duration, it is not probable a court of law will take notice of such a trust, or how long the same is to last; here it is made part of the case, that it is not yet determined, and it does not appear when it will.

So that I take it, this term of 500 years must be looked upon in a court of law, as an absolute term for so long a time, and that the trusts thereof are quite out of the case. [39]

Then the case is no more, than that the testator devises the premises to *A.* for 500 years, and from and after the determination of that estate, then to the first son of *Thomas Gore* to be begotten in tail male, with a remainder to *Edward Gore*, second son of the testator, for his life, &c.

And here it seems to me, that the devise over cannot, by way of executory devise, (as the other side would have it operate,) pass or vest any legal or transferable estate in this first son, until the determination of the 500 years term.

As to this, the nature of an executory devise is to be considered.

Now every executory devise is to be considered as an original devise, not depending upon any precedent estate given by the will, but is an estate which is to arise and spring up in possession at the time appointed for that purpose, and then, and not till then, to take effect as a legal and alienable estate.

In the mean while, the devise is rightly and properly called an executory devise.

Perhaps a term so long as five hundred years may look a little shocking; and in (*a*) ancient times these long terms were not usual; terms for years, though never so long, were formerly but little regarded in law, as they were at the mercy of the remainder-man, or reversioner, to destroy them; for these termors could not falsify, in case of a feigned recovery suffered by the remainder-man or reversioner, until this was remedied by stat. 23 H. 8. cap. 15. [40]

(*a*) Vide vol. I. 574. Wind *v.* Albone.

In the present case, instead of this long term of five hundred years, I would put the case of a term of five years only, for the alteration of the term can make no alteration of the law, as to this point of the estate's vesting.

Suppose then the testator, in the principal case, had devised the premises to *A.* for five years, and after the determination of that term, to the first son of *Thomas Gore*, to be begotten in tail male.

And suppose that after the death of the testator, and within this term of five years, *Thomas Gore* had had a son born, yet I take it that, until the five years had determined,

GORE *v.* GORE. no legal or alienable estate had vested in this first son of *Thomas Gore*.

If any legal estate would have vested in such first son, &c. upon his birth, it must have vested in him as a remainder, that is, the trustees must have been possessed of the term for five hundred years, (or for five years, as I would now call it,) remainder to the first son of *Thomas Gore* (being born) in tail male.

But, with submission, that estate which at first, at the making of this will, and at the death of the testator, was an executory devise, can never afterwards be turned into or become a remainder, nor can it be claimed as a remainder, but must continue an executory devise, until it takes effect in possession.

[41] This point would appear in a clearer light, if I might suppose that at the time of the testator's making his will, this *Thomas Gore* had had a son born.

In regard that then, by the devise of the premises in question to the trustees for 500 years, and from and after the determination of that estate, to the first son of *Thomas Gore*, &c., this had been a common plain vested remainder in such first son of *Thomas*, &c.

But it happening, in the present case, that *Thomas Gore* had no son born at the making of the will, nor at the death of the testator, and the precedent estate being only a term for years, and consequently unable to support a contingent remainder, and therefore this being void as a remainder, for this reason, say they on the other side, we do not claim the premises by way of remainder, for as such it would be void, but our title is by way of executory devise.

The consequence of which must be, that they will be obliged to abide by this as an executory devise, and it can never afterwards operate as a remainder.

Whereas, if the estate in the premises were to vest in the first son of *Thomas Gore* upon his birth, as a legal estate, it must be in him as a remainder expectant upon the term for 500 years in the trustees.

But though I do insist, that no legal estate can vest in the first son of *Thomas Gore* upon his birth, until the determination of the precedent term, either by way of remainder, or otherwise, yet if this precedent term were but for five years instead of five hundred, or for any term not too long for an executory devise to wait and expect, I might admit, that if the testator in

[42] the present case had devised the premises to trustees for five years, or for thirty years, and afterwards to the first son of the

body of *Thomas Gore* to be begotten, and *Thomas Gore* had had a son born within the term of thirty years, that a sort of right or possibility might have vested in such son upon his birth, and such a possibility as would have descended to the heirs male of his body, though such son had died before the determination of the term, and yet this would be no legal estate.

But this is no new notion, being exactly agreeable with another case settled and adjudged of an executory devise too, and that is, where a man possessed of a term for 1000 years devises to *A.* for life, remainder to *B.* his executors and administrators during the residue of the term, and dies.

Here *A.* the first devisee has, during his life, the whole interest in the term, and *B.* the devisee over, notwithstanding the manifest impossibility that *A.* should outlive these 1000 years, has, in notion of law, but a possibility; wherefore, though it was for sometime held, that such interest would not so much as go to executors, (*Moore* 831. *Price* versus *Almory*,) which difficulty is now got over, and the law altered in that point, yet it is still held and resolved, that *B.* the devisee over of the term, has no (*a*) legal interest therein, and that he has but a possibility, which he can neither assign, grant over, or devise. So is 4 *Co.* 66. *b.* *Fulwood's* case, 10 *Co.* 47. *b.* *Lampet's* case, 1 *Sid.* 187. *Cooke* v. *Bellamy*.

(*a*) See the case of Wind versus Albone, vol. 1. ubi supra.

From hence it is manifest, that one may have an interest or possibility, and yet no legal estate; and in case the precedent term in the present case were but for five, or thirty years, with remainder to the first son of *Thomas Gore*, such first son, if born within the five, or within the thirty years, might, on his birth, have an interest or possibility, but no legal estate, until the determination of the precedent term.

[43]

But in the principal case, the precedent term being for so long a time as 500 years, this is too long for an executory devise to wait, and therefore void, by reason of the remoteness of its commencement.

Besides, as in the present case I have said, that every executory devise is an original devise, and independent upon any precedent term, it seems the same, as if the precedent term were out of the case, in every respect, except to denote and ascertain the future time, when the executory devise is to take effect.

And therefore I would mention some cases in the books of executory devises without any term limited before them, or any contingency attending them.

GORE v. GORE. In 1 *Lut.* 798. *Clark* v. *Smith*, this case is mentioned by the court, and admitted to be law: *A.* seised of land in fee, devises to *B.* in fee, to commence and take effect six months after the testator's death, this is plainly a good executory devise, and will take effect at the end of six months after the testator's death.

But it is expressly held there, that during those six months, the estate descends, and continues in the heir at law of the testator.

Consequently it does not vest in the devisee during the six
[44] months; for one and the same estate cannot be at the same time entirely in two different persons, (viz.) in the heir, and in the devisee, and as the freehold and inheritance is in the heir, and out of the devisee, so the devisee, for these six months, cannot alien, or assign over such estate.

And as six months was the time mentioned in that case, the law will be the same, were the devise to take effect six years after the testator's death; for during that time, no legal estate being vested in the devisee, the ownership of the estate would be wholly locked up.

Of the same nature with this, is another case solemnly adjudged upon a special verdict, in *Cro. Eliz.* 878. *Pay's* case: one seised in fee devised lands to *J. S.* for five years from *Michaelmas* then next, remainder to the then plaintiff in fee, and the question was, whether this was a good devise of the remainder in fee to the plaintiff?

Obj. It was not a good devise of such remainder, because the same could not vest in the devisee upon the death of the testator; and it being a remainder in fee, expectant upon a lease for years, the freehold would be in abeyance, which the law would not suffer; and that the freehold or remainder in fee would not vest before *Michaelmas* then next after the testator's death, because the particular estate devised for five years was not to begin or take effect until that time.

But adjudged, that this was a good devise of the remainder in fee; for though it was admitted, that a freehold could not expect, or be in abeyance, yet in that case, the freehold and fee-simple descended, and vested in the heir at law till *Michael-*
[45] *mas*, and so was not in abeyance, and this made the devise of the fee-simple after *Michaelmas* good.

Now both these cases manifestly shew, that in such executory devises, the legal estate descends to the heir at law, till the time appointed comes for the executory devise to take effect in possession, and that, in the mean time, there is no legal

estate in the devisee; the plain consequence of which is, that he cannot grant over any legal estate, but that, during that time, the ownership of the estate is locked up, and become unalienable.

Then the question comes to be, how long the law will allow that the ownership of an estate shall be thus entirely locked up, or for how long time an executory devise will be permitted to wait and expect?

And this question seems in a great measure to have been determined in the case of *Scattergood* and *Edge*, *Salk.* 229. where it is said by the Court, that twenty, nay thirty years have been allowed a reasonable time for the commencement of an executory devise, which seems to imply, that no more than thirty years would be allowed.

But can it ever be maintained, that a devise of lands to *J. S.* and his heirs, to commence and take effect 500 years after the death of the testator, would be allowed? or, to bring it nearer to the principal case, that a devise to the first son of *Thomas Gore* to be begotten in tail male, to commence and take effect 500 years after the death of the testator, would be good?

Surely, if a devise to a man *in esse* in fee, to take effect and commence 500 years after the death of the testator, be void, a devise in fee, or in tail to the first son of *Thomas Gore* then not born, to commence 500 years after the testator's death, must be at least equally void. [46]

And yet, in effect, this is the present case, with this difference only, that in the principal case, the first son of *Thomas Gore* (if the devise to him were good) would have his chance of coming to his estate sooner, in case the trustees for the precedent term of 500 years should ever forfeit their term; whereas in the case I last put, the executory devise must wait until the 500 years term shall have ended by effluxion of time.

Though certainly these very unlikely and improbable accidents for the shortening of a term of 500 years, will never be so far regarded, as to make good such remote executory devises to commence 500 years after the death of the testator, upon a supposition, that such foreign contingencies might happen; and that during all the whole term of 500 years, the ownership of the estate is to be unalienable, until that foreign contingency of the termors forfeiting their term does happen.

To bring the case still nearer, if the law be, as I humbly insist it is, that every executory devise is to be taken as an original

GORE *v.* GORE. devise, entirely independent on any precedent term or estate given by the will:

Then the case will be the same, as if the precedent term of 500 years given by the will to the trustees, had been of other lands; wherefore I would beg leave, upon that supposition, to put the case thus: (viz.) that the testator, in the principal case, had been seised in fee of the two manors of *Dale* and *Sale*, and
[47] had devised his manor of *Dale* to trustees for 500 years, and by the same will had devised his manor of *Sale* to the first son of *Thomas Gore* to be begotten in tail male, to commence and take effect, from and after the determination of the 500 years, which the testator had before devised to the trustees in the manor of *Dale*.

In this last case, the first son of *Thomas Gore*, and devisee of the manor of *Sale*, would have the benefit of the contingency of the trustees forfeiting the 500 years term; but surely the devise in this case to the first son of *Thomas Gore* in tail, though with the benefit of the chance of the trustees forfeiting their term, would be void nevertheless, as having too remote a commencement.

So that (as I apprehend) in the principal case, no legal or alienable estate vesting in the first son of *Thomas Gore* until the determination of the 500 years term, and during the continuance of such whole term the estate of the premises, and the ownership thereof, being entirely locked up, this is a plain perpetuity, and a void executory devise to the first son of *Thomas Gore*.

Besides, there is another reason, why this devise cannot take effect as an executory devise; and that is, that in this case the freehold of the premises cannot descend to the heir at law of the testator, there to wait until the executory devise takes effect. The only reason, and only foundation of reason, that can be given for the maintaining of these executory devises of a freehold or inheritance, where there is no disposition by the will of the freehold, in the mean time, and until the executory devise shall take effect, is, that the freehold and fee-simple of the premises are
[48] in the mean time to descend to the heir at law of the testator.

And this is the answer, the only answer made to the objection against executory devises, and which otherwise would be a fatal one; for otherwise, and were it not for this answer, where the devise is to one for years, with remainder to an unborn person in tail or in fee, there the freehold of the premises would be in abeyance, which the law will not permit.

But in the principal case, the freehold of the premises can-

not descend to the heir at law of the testator, because it is devised away from such heir at law, to the testator's second son, *Edward Gore.*

And, the freehold of the premises being actually vested and fixed in the said *Edward Gore*, it cannot be devested and fetched back again out of him, and carried to the first son of *Thomas Gore*, when born: and therefore,

In this case the executory devise to the first son of *Thomas Gore*, to be begotten, is void.

Now, as to this point, I would not suppose the devise, in this case, by the testator to the trustees, to be for so long a term as 500 years, but I will take it to be for some shorter term, after which an executory devise may commence; as for instance, a term for five years only.

And then the case would be thus: the testator devises the premises in question to trustees for five years, and from and after the determination of that term, to the first and other sons of *Thomas Gore*, to be begotten in tail male, successively, remainder to *Edward Gore* the testator's second son for his life, [49] and so to his first-born, &c. with remainder to several other persons for their lives, and to their sons in tail, with remainder to the right heirs of the testator.

Now when the testator has devised the premises in question to trustees for a term of years, and from and after the determination thereof, to the first, &c. son of *Thomas Gore*, to be begotten in tail male:

As an estate-tail is as much a particular estate (since the statute *de donis*) as an estate for life is, I take it, that the testator has in such case a power to devise or dispose of by his will, the remainder in fee expectant upon this executory devise in tail, in the same manner, as if the executory devise to the first son of *Thomas Gore*, &c. had been for his life only; and in this case, the testator having by his will devised over the remainder expectant upon this executory devise in tail, unto *Edward Gore* the testator's second son, for his life, with several remainders over, this not only prevents the estate from descending to the heir at law, in aid of the executory devise, but it seems pretty clear, that the remainder over devised to *Edward Gore* for his life, is a vested remainder, and a fixed estate of freehold in him, which by virtue of the will he takes by purchase; and, if so, then this remainder and freehold being once vested in *Edward Gore* the testator's second son, cannot be devested, or fetched back, or give way, on the birth of the first son of *Thomas Gore.*

GORE v. GORE. I look upon this case to be the same, as if the devise had been to the trustees for a term of years, and from and after the determination thereof, to the first son of *Thomas Gore*, to be
[50] begotten, in tail male, with remainder to *Edward Gore*, the testator's second son, *in fee*, instead of *for life* only.

In which case no estate whatsoever could descend to the testator's heir at law, in aid of, and to make way for the executory devise to the first son of *Thomas Gore*, at the time he should be entitled to the same.

And I do not see any difference, as to this point, whether the fee-simple, or only the freehold, is devised away from the heir at law; for in either case, the executory devise to the first son of *Thomas Gore* to be begotten will fail.

I would own, if the testator had devised the premises to the trustees for five years, and from and after the determination of that estate, to the first son of *Thomas Gore*, to be begotten, in fee-simple, instead of an estate-tail, here no remainder could have been limited over, and the fee-simple would have descended to the heir at law of the testator, in aid of the executory devise, and to give way to it, when at the time appointed, it should take effect.

So if the devise had been to trustees for the term of five years, and from and after the determination thereof, to the first son of *Thomas Gore* to be begotten in tail male, without devising any remainder over; here also the fee-simple would have descended to the heir at law of the testator, in aid of the executory devise, when it should take effect.

So if the devise over had been to the right heirs of the testator, which would be a void devise, because the heir, in such case, would be in by descent.

[51] But it is quite otherwise where, after this executory devise in tail, the remainder for life is devised over to one *in esse*, and capable of taking, as here it is to *Edward Gore* the testator's second son, in regard the freehold being thereupon once vested in him, cannot be fetched back again, or give way to the after-born son of *Thomas Gore*.

This is the known difference, as to this point, betwixt an estate vested by purchase, and an estate vested by descent: as if lands were granted to *A.* for life, the remainder to the right heirs of *B.* and *B.* has issue a daughter, and dies leaving his wife *ensient* with a son who is afterwards born, the daughter claiming by purchase shall retain the lands against the posthumous son.

But if these lands had been granted to *B.* and his heirs, and

B. had died leaving a daughter, and his wife *ensient* with a son who is afterwards born, her title being by descent, shall give way to that of the son. 1 *Co.* 95. *Shelly's* case. 3 *Co.* 61. *b. Lincoln* college case.

So in the present case, where the reversion in fee descends to the heir at law, it shall give way to the executory devise, whenever the son of *Thomas Gore* shall become entitled; but on the other hand, where the remainder, after this executory devise to the first son of *Thomas Gore* in tail, is devised over, and vested as by purchase, such remainder cannot be fetched back, nor will it give way to an executory devise on a subsequent birth.

Nor do I know any precedent or case adjudged, where there is a devise for years, and afterwards an executory devise in tail [52] or for life, and after that a remainder over for life, or in fee, to a person *in esse*, where such an executory devise is allowed good.

In the case of *Scattergood* versus *Edge* (*Salk. ubi supra*) the devise is to one for eleven years, and afterwards an executory devise in tail, (as was endeavoured to be made out) but the remainder was there to the right heirs of the testator, so that the reversion in fee descended to the heir at law, in aid of, and to give way to the executory devise: whereas,

Here the remainder is devised from the heir at law, and given to *Edward Gore* the testator's second son; and if no case has gone so far, the court will not (I presume) carry this case further than any former case of the like nature, in favour (as has been said) of so inconvenient an estate.

But further, there is, in the principal case, another reason why there should not be any construction made for the descending of the freehold of the premises to the heir at law, there to wait until the executory devise to the first son of *Thomas Gore* shall take effect, (viz.) because if the freehold of the premises, upon the testator's death, shall be construed to descend to his heir at law (who is the testator's eldest son *Thomas Gore*,)

This will merge and destroy the rent-charge of 50*l.* per annum, devised to his eldest son by the same will, and out of the same lands.

And as to this the case in short is, the testator devises his lands to trustees for 500 years, in trust to pay 50*l.* per annum to his eldest son *Thomas Gore* for his life, but with an express power to his said eldest son, to distrain upon part of the premises for this 50*l.* per annum rent-charge, and after the determination of [53]

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GORE *v.* GORE. the 500 years term, then to the first son of *Thomas Gore* to be begotten in tail male.

Now it cannot be said, that this rent-charge of 50*l.* per annum to *Thomas Gore*, is only a trust on the 500 years term, because, as there is an express power given by the will to *Thomas Gore* to distrain upon the premises for this 50*l.* per annum, these words alone make it a rent-charge to him issuing out of the lands; so in *Lit.* (*sect.* 218.) it is said, that granting a power to one to distrain on land for any annual sum, creates a rent-charge.

Then the testator's eldest son *Thomas Gore* having a legal title to this rent-charge of 50*l.* per annum, if the freehold of the same land out of which the rent-charge issues, be construed to descend to him, this will merge, and destroy the rent-charge created by the same will; for it is wholly inconsistent, for the same person to have the land itself, and the rent issuing out of the land; and I take it, that the legal estate of the land being devised to trustees for years only, will not prevent the merger of the rent, but as the freehold of the land is in him that claims the rent, the latter must be extinct: as if the case were, that *A.* has a rent of 20*l.* per annum issuing out of land, and the owner of the land were to devise the land to *J. S.* for years, remainder to *A.* (that had the rent) for life, if *A.* agrees to and accepts this devise, the rent is gone, for the freehold of the rent is merged, so that *A.* cannot have an estate for life in the rent; and other estate he cannot have therein, in regard no other estate was granted him, and he cannot have an estate without a donor or grantor, and so the rent is gone.

[54] Wherefore this construction of the freehold of the premises descending to the testator's eldest son and heir, and thereby merging the rent-charge of 50*l.* per annum given by the same will, should be avoided, without an absolute necessity for it; and here is no necessity for it, forasmuch as the land may very properly and reasonably be construed to go over to the testator's second son the next remainder-man, a person *in esse*, and capable of taking.

So, that, in the present case, there seems to be no foundation to suppose the freehold of the premises in question to descend to the testator's heir at law, there to wait till the executory devise shall take effect.

And without such descent, there is as little foundation to maintain this devise over to the first son of *Thomas Gore* to be begotten in tail male, to be good as an executory devise.

I shall insist only on one other reason, why this devise over

of the premises to the first son of *Thomas Gore* to be begotten, cannot operate as an executory devise; and that is, because it is devised by way of remainder.

The devise is to trustees for 500 years, and from and after the determination of that estate, then to the use of the first, &c. son of *Thomas Gore* to be begotten in tail male successively.

This is a plain devise of a remainder, a devise by way of remainder to the first son of *Thomas Gore*, &c.

Now there are the plainest differences between the nature of [55] a remainder, and that of an executory devise.

1*st*, There cannot be a remainder without a particular estate; but there may be an executory devise without any particular or precedent estate.

2*dly*, A remainder is subject to be discontinued, devested or displaced by feoffment or fine, or to be barred by a recovery.

But an executory devise cannot be barred by recovery, nor discontinued, nor so much as displaced, or turned to a right by any feoffment or fine; for wheresoever the land which is subjected to this executory devise is conveyed, it passes with this clog chained to it; so that it is very reasonable to insist, that where an estate is conveyed as, or by way of a remainder, there it shall not operate as an executory devise, especially, if there be, (as in this case there was) at the time of making the will, a possibility that it might vest as a remainder, by the birth of a son in the life-time of the testator, and after the making the will.

And in this objection I am warranted, though not by any resolution, yet by an opinion, and that a very great one; it is that of Lord Chief Justice *Holt*, and the rest of the judges, in a case which has been cited, but I think this part of it not taken notice of; I mean the case of *Goodright* and *Cornish*, reported (though but shortly) in 1 *Salk.* 226. The case, as there reported, is thus:

One *Knowling*, seised in fee of lands, devises them to his eldest son *John* for fifty years, if he so long live, and then fol- [56] low these words, "and as for my inheritance after the term, "I do devise the same to the heirs male of the body of my "eldest son *John*, and for default of such issue, to my "youngest son *Richard*." Resolved, that the devise of the remainder to the heirs male of the body of the testator's eldest son *John* was void as a remainder, for want of a freehold to support it.

GORE *v.* GORE. And the Lord Chief Justice *Holt*, together with the rest of the judges, likewise held, that this devise to the heirs male of the body of the testator's eldest son *John*, expectant on this term of fifty years, could not operate as an executory devise; and one of the reasons given for it was, † because it was devised as a remainder; indeed another reason added to it was, because it was limited *per verba de præsenti;* so that each of them was held for a reason why the devise in that case could not operate as an executory one, and one of them was, because it was devised by way of remainder.

Besides, this I may observe upon the case as reported by *Salk.* (and which in fact were the words of the will in that case,)

That the words there insisted upon, to make an executory devise to the heirs male of the body of the testator's son *John*, are much more proper, and much more adapted for an executory devise, than the words of the will in the principal case: in the case of *Goodright* and *Cornish*, the testator devises his lands to his eldest son *John* for fifty years, if he so long live; then
[57] follow these words, " and as for my inheritance after the said " term, I do devise the same to the heirs male of my eldest son " *John:*" now these words in the will are proper words to introduce a new original executory devise; and yet it was resolved that they should not operate as an executory devise; and one of the reasons given was, for that they imported a devise of a remainder: whereas,

In the principal case, where the devise is to trustees for 500 years, and from and after the determination of that estate, then to the first son of the body of *Thomas Gore* to be begotten in tail male, surely no words can be more proper, no words more natural to express a limitation of a remainder, than to say, from and after the determination of the precedent estate for years.

And if the words of the will, in the case of *Goodright* and *Cornish*, shall be looked upon so much to import a limitation of a remainder, as for that reason to hinder the devise from ever operating as an executory devise,

The words in the principal case much more plainly import a limitation of a remainder, and therefore, according to the opinion in *Salk.* are not to be construed to operate otherwise than as a remainder. For which reason, in my apprehension, this

† Sed Vide 1 Salk. Where the opinion of the Court, as to this point, is laid down with some uncertainty.

devise over, in the principal case, to the first son of *Thomas Gore* to be begotten in tail male, is void, and cannot take effect as an executory devise. GORE v. GORE.

I shall only add one thing more, and that is touching the intention of the testator in this case, which has been pretty much insisted upon by the other side, as well in this court, as in the court from whence the case comes.

It is objected, that the intention of the testator in this case, and in his will too, is in favour of the sons of his eldest son *Thomas Gore*, and that these sons of the testator's eldest son should have preference to the testator's younger sons. [58]

And perhaps this might be the testator's intention; nay, supposing it was, yet every man's intention in a will, as well as in a deed, must be conformable to the rules of law, or else it is to be rejected.

If the testator (as here he seems to have done) intended to devise his estate in such a manner, as that the freehold thereof should be in abeyance; this intention is contrary to the settled rules of law, and must be rejected.

If the testator intended (as here he seems to have done) to make an executory devise, which is not to take effect within that compass of time which the law prescribes for that purpose; this is contrary to law, and such intention must not take place.

If the testator intended (as here he plainly did) that the freehold, vested in a remainder-man, (the testator's second son *Edward Gore*,) should, after it was thus vested and settled, be devested and fetched back again, to give way to a subsequent birth of a prior remainder-man; this intention is contrary to the established rules of law, and therefore must not prevail.

I would suppose the facts in the present case to have happened thus: as the devise is to trustees for 500 years, and afterwards to the first, &c. son of *Thomas Gore* to be begotten in tail male, successively, with remainder to the testator's second son *Edward Gore* for life, with remainders over *prout* the will; [59]

I would suppose, for argument sake, that this first son of *Thomas Gore* should take, and that he had entered upon, and enjoyed the estate, subject to the 500 years term, and that afterwards the first son of *Thomas Gore* should die without issue, and without leaving any brother then in being, so that then *Edward Gore* the second son of the testator, as being the next remainder-man, had entered, and that afterwards *Tho-*

GORE *v.* GORE. *mas Gore* the testator's eldest son had had another (posthumous) son:

There would be no colour, nor would it be contended for, if this were the fact, that this second son of *Thomas Gore*, so born out of time (as I may say) born after his brother's death without issue, and after the freehold is gone over to the next remainder-man, should, notwithstanding, be entitled to this estate.

And yet, in that case, the intention of the testator is as plain, and by the same words is expressed to be, as much in favour of the second son of *Thomas Gore*, as of his eldest son, and that every son of *Thomas Gore* should take in his turn, in preference to the younger sons of the testator.

But still this intention being contrary to law, is not to be regarded.

[60] But as this will is penned, there is very little room to argue from the intention of the testator, in favour of the sons of *Thomas Gore* the testator's eldest son; because he, that argues *for* the intention of the testator in *this* part of the will, must argue *against* what is the plain intention of the testator in *another* part of the will; he that argues to make this a good executory devise, in favour of the first son of *Thomas Gore*, must, in order to make good this executory devise, endeavour to prove, that the premises, on the death of the testator, did descend to his heir at law, (viz.) his eldest son *Thomas Gore*, to wait there, until the executory devise should take place.

But nothing can be more against the intention of the testator than this would be: for the testator in his will declares his intention, in the plainest manner, and in the most express words, to be that his eldest son and heir *Thomas Gore* shall only have a rent-charge of 50*l.* a year out of his lands.

Nay, not only says so by his will, but gives his reasons for it, viz. that his eldest son *Thomas Gore* would have another estate upon his death, of 400*l.* per annum in *Wilts:* also for that the testator had, before that time, supplied his son and heir with divers sums of money.

Now when the testator has expressly said by his will, that his eldest son and heir shall have no part of his lands:

The other side, who at the same time must admit they argue for the intention of the testator, must insist, contrary to this intention, that the freehold and fee-simple of all the testator's land shall descend to him at the testator's death; and while the testator says, that his eldest son shall have a rent-charge

of 50*l.* per annum out of his estate, the other side who are still maintaining the intention of the testator, must say, that [61] the eldest son of the testator cannot have this rent-charge of 50*l.* per annum, that being merged by the descent of the land upon him. All which are inconsistencies, and therefore doubtless, whatever was the intention of the testator in this case, it must be rejected, not only as repugnant to the rules of law, but indeed as inconsistent with itself.

As to the other question, which is likewise sent to your lordships for your opinion, (viz.) in whom the freehold of the premises vested upon the death of the testator?

I take this to be entirely depending upon the former question; for if the devise over of the premises expectant upon this term of 500 years to the first, &c. son of *Thomas Gore* to be begotten, be a void devise, as we have endeavoured to prove it is, then it necessarily follows, that the next remainder subsequent to this void devise, which is the devise to the testator's second son *Edward Gore*, must take place, and consequently the freehold of the premises, upon the testator's death, must then vest in the testator's second son *Edward Gore*; this is so plain a consequence, that I shall give your lordships no trouble about it.

Upon the whole matter; if, at the time of making of this will now in question, it was possible that the devise over to the first son of *Thomas Gore* to be begotten in tail male, might operate and take effect as a remainder, as it plainly might, in case the first son of *Thomas Gore* had been born in the life-time of the testator, which at the time of making this will was possible:

If the rule in discountenance of these executory devises be, that whenever a limitation of an estate might by any possibility [62] take effect as a contingent remainder, there it shall not operate as an executory devise. As I take this to be the rule:

If there be no difference in the legal acceptation of the words *begotten* or *to be begotten*, as I take it to be settled, that there is not:

If this executory devise cannot take effect or vest as a legal and alienable estate upon the birth of a son of *Thomas Gore*, but must wait and expect until the term of 500 years is determined, as I conceive it must:

If an executory devise to take effect on the determination of a term of 500 years be a perpetuity, and therefore a void devise, as most plainly it is:

If the rule be, that an executory devise of a freehold, expectant on a lease for years only, cannot be good, unless in

GORE *v.* GORE. cases where the freehold may descend to the heir at law of the testator, there to wait until the executory devise takes effect, as I humbly apprehend this to be the rule :

If in the present case, the freehold of the premises cannot descend to the heir at law of the testator, the same being devised over to a third person *in esse*, as plainly it cannot:

If it be a rule in law, that a freehold once vested by purchase, cannot be afterwards devested, and fetched back again, to make way, and give place on the birth of a nearer remainder person, as surely this is the rule :

[63] If in case of a devise over, where it is limited by way of remainder, it shall not operate as an executory devise, which is so held in the case I have cited :

If the courts both of law and equity have all declared, that they would not advance an executory devise one single step further than former resolutions had carried them :

And if what the other side now labour at, would be to extend them further than ever yet they have been carried, as I presume it would be :

If any one of these several points be for us, and we submit whether they be not all for us :

Then we hope that your lordships' opinion will be also for us,

And pray your judgment accordingly for the plaintiff.

Whereupon all the four judges of the King's Bench that then were, (viz.) *Pratt*, C. J. *Powis*, *Eyre*, and *Fortescue Aland*, justices, certified their opinions under their hands, "That the devise to the eldest son of *Thomas Gore* was void ; "that it could not be good as a remainder, for want of a free- "hold to support it; and that it could not take effect as an "executory devise, because it was too remote, (viz.) after 500 "years." But Lord *Macclesfield* expressed some dissatisfaction at this opinion of the judges, saying, that though the law might be so, yet the term of 500 years being but a trust term, and to be considered in equity as a security only for money, was not to be so far regarded (at least in equity) as to make the devise over void.

[64] After which the eldest son *Thomas Gore* and his brother *Edward* came to an agreement, which was confirmed by the court.

Afterwards *Thomas Gore* had a son and died, and the son of *Thomas Gore* bringing this matter over again in Chancery, Lord Chancellor *King* sent it a second time to the Court of King's Bench, where Lord *Hardwicke* C. J., *Page*, *Probyn* and *Lee*, justices, certified their opinion against the opinion of their predecessors, (viz.) "That this was a good executory

" devise, and not too remote; for that it must in all events, " one way or other, happen, upon the death of *Thomas Gore*, " whether he should have a son or not, and either upon the " birth of the son, or upon his death without issue male, the " freehold must vest."

Lord *Raymond* also was of this last opinion.

The two certificates were in the words following:

We have heard counsel on both sides on the question above specified, and having considered the same, are of opinion, that the devise of the manors above-mentioned to the first son of *Thomas Gore* is void, because he cannot take by way of remainder, for that there is no freehold to support it; nor can he take by way of executory devise, because it is not to take place within that compass of time which the law allows; and we are also of opinion, that the freehold of the same manors, on the death of the devisor, vested in *Edward* the second son.

——— 1722. *John Pratt.*
Littleton Powis.
R. Eyre.
J. Fortescue Aland.

[65]

Upon hearing counsel on both sides, and consideration of this case, we are of opinion, that the devise of the manors of *Barrow* and *Southley* to the first son of *Thomas Gore* is good by way of executory devise, and that the freehold of the said manors, on the death of the devisor, vested in his heir at law.

Jan. 26, 1733. *Hardwicke.*
F. Page.
E. Probyn.
W. Lee.

AYLIFFE *versus* MR. JUSTICE TRACY.

CASE 9.

THE plaintiff courted one of the daughters of Sir *Thomas Haslewood*, and treated with the father about the marriage; the father consents to the marriage, and writes to his daughter, intimating, that he had met the plaintiff Mr. *Ayliffe*, and had agreed to give him as a portion 3000*l.* which the plaintiff (he said) seemed fully to assent to, and that they were to meet the next day, when the affair was to be fully concluded; and subscribed his name to the letter.

9 Mod. 3. 2 Eq. Ca. Ab. 19. pl. 15. 50. pl. 25. A letter from a father to his daughter by which he agrees to give her 3000*l.* portion, and this not shewn to the man who afterwards married the daughter, does not take the promise out of the statute of frauds.

Accordingly they met and agreed to the marriage, and the father gave money to the daughter to buy her wedding-clothes,

AYLIFFE *v.* TRACY.

and the wedding-day having been appointed, the father died before that day, having made his will long before this treaty of marriage, and given his daughter only 2000*l.*

The daughter did not shew this letter to the plaintiff her intended husband, whom she afterwards married, and the 2000*l.* legacy was paid to the plaintiff the husband; but he did not,

[66] neither was he required to make any settlement on his wife, but was a merchant and freeman of *London*.

Lord Chancellor: This being no more than a communication, has no ingredient of equity; the husband made no settlement; he did not know of this letter, it being wrote to the daughter, and therefore cannot be supposed to have married in confidence of the letter:

Then he accepted of the 2000*l.* legacy as the portion, and at that time demanded no more, and the other daughter had but 1500*l.* portion.

Dismiss the bill. (1)

CASE 10.

VERNON *versus* STEPHENS.

2 Eq. Ca. Ab. 56 pl. 3. *A.* articles to buy land, and pays part of the purchase money; afterwards he enters into several orders of court to pay the residue by such a day, and in default thereof to give up the articles, and lose what he had before paid; court will relieve, though these orders have not been complied with.

THE plaintiff brought this bill for a specific performance of articles entered into by the defendant's father *Stephens*, to the plaintiff, for sale of the manor of *Wheelock* in *Cheshire* for 1200*l.* and 100 guineas.

(91). 2. Q. B. 385.

There had arose some difficulty about the title, and the plaintiff insisting that the same was not good, without an act of parliament, the defendant's father procured an act of parliament; upon which the plaintiff paid part of the money, but making default in payment of the residue, the defendant's father brought a bill to have the residue of the money, or to be discharged of the articles.

[67] Just before that bill was ready for hearing, the plaintiff and defendant's father entered into an order by consent, signed by both parties, and reciting the articles, by which the plaintiff agreed to pay the money by such a day, or in default thereof the articles to be delivered up and cancelled, and the defendant's father to hold the premises discharged of the articles.

Then the plaintiff paid 1000*l.* in part, but made default in payment of the residue, and entered into another order by

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(1) This case is very differently stated in 9 Mod. 3. In the Register's book nothing appears but the order of dismissal, Reg. Lib. A. 1721, fol. 285.

consent signed by both parties, whereby a further day was given, when, if the money was not paid, the plaintiff agreed to lose all the money which he had advanced before, and to lose the benefit of the articles, which were to be put into the hands of Mr. *Cox* the counsel, and delivered over to the defendant's father in default of payment, and in case of such default, the defendant's father to hold the premises discharged of the articles.

The plaintiff *Vernon*, having again made default, now brought this bill to have the purchase completed, on payment of what was due, with interest, and to be relieved against these orders.

Lord Chancellor: Here have been solemn agreements that ought not slightly to be got over; but however, if the defendant has his money, interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff, to lose all the money which he has paid; lapse of time in payment may be recompensed with interest and costs; (*z*) and as to these agreements, they were all intended only as a security for payment of the money, which end is answered by the payment of principal, interest and costs.

In 1720, when the money was to have been paid, there was a great scarcity of money, they in whose hands it was, locking it up; also, at that time, the defendant's father was dead, which was the act of God, and his executors not acting, it was some time before the defendant took out administration with the will annexed of his father, which was the default of the party; so that the plaintiff's payment of the money at the exact time was dispensed with. [68]

Let the plaintiff be relieved upon payment of principal, interest and costs.

ANONYMUS.

CASE 11.

IF an issue be directed out of chancery to be tried, and the party plaintiff in the issue gives notice of trial, and does not countermand it in time; upon motion, the Court of Chancery will give costs, and not put the defendant to move the court of law where the issue is to be tried.

In case of an issue out of chancery, it is proper to move that court for costs for not going on to trial, or to move there for a special jury.

(*z*) But see *Mackreth* v. *Marlar*, 1 Cox, 259, (approved in *Broome* v. *Monck*, 10 Ves. 597.) *Lowther* v. *Lady Andover*, 1 Bro. C. C. 396. *Ex parte Hunter*, 6 Ves. 94. *Steadman* v. *Lord Galloway*. Sugden, Vendors, 359, 360, (6th Edit.) *Hudson* v. *Bartram*, 3 Madd. 440. *Reynolds* v. *Nelson*, 6 Madd. 18. *Morse* v. *Merest*, 6 Madd. 26.

So on an issue's being directed out of the Court of Chancery, after such issue made up, it is proper to move the Court of Chancery for a special jury, if the circumstances of the case require it; and the court will grant the same, as they did in the case of the *Attorney General* and *Snow*.

CASE 12.

* SCOTT *versus* BARGEMAN.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 542. pl. 12. One having a wife and three daughters devises 900*l.* to his three daughters equally, payable at their respective ages of twenty-one or marriage, and if all die before their legacies were payable, then the whole to the mother; if two of the daughters die before their shares become due, the surviving daughter is entitled to the whole.

ONE has a wife and three daughters, *A. B.* and *C.*, and being possessed of a personal estate, devises all to his wife, upon condition, that she would immediately after his death pay 900*l.* into the hands of *J. S.* in trust to lay out the same at interest, and pay the interest thereof to his wife for her life, if she shall so long continue a widow; and after her death or marriage, in trust that *J. S.* shall divide the 900*l.* equally among the three daughters, at their respective ages of twenty-one, or marriage, *provided that if all his three daughters should die before their legacies should become payable, then the mother*, whom the testator also made executrix, should have the whole 900*l.* paid to her.

[*69] The wife pays the 900*l.* to *J. S.* and marries a second husband, (viz.) the defendant *Bargeman;* the two eldest daughters die under age and unmarried; the youngest daughter attains twenty-one; and the question being, whether she was entitled to all, or what part of the 900*l.*,

Lord Chancellor: The youngest daughter is entitled to the whole 900*l.* by virtue of the clause in the will, which says, "if all the three daughters shall die before their age of twenty-"one or marriage, then the wife shall have the whole 900*l.*," for this plainly excludes the mother from having the 900*l.* or any part of it, unless these contingencies shall have happened, and the share of 300*l.* a-piece did not vest absolutely in any of the three daughters under age, so as to go, according to the

[70] statute of distributions, to their representatives, in regard it was possible all the three daughters might die before their ages of twenty-one or marriage, in which case the whole 900*l.* is devised over to the mother; consequently the whole 900*l.* does now belong to the surviving daughter the plaintiff. (1) (*z*)

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(1) Reg. Lib. B. 1721. fol. 458. by the name of *Schott* v. *Bergman*.

(*z*) See *Mackell* v. *Winter*, 3 Ves. 536. *Bayard* v. *Smith*, 14 Ves. 470. v. *Randall*, 1 Jac. & W. 100. *Beauman* v. *Stock*, 2 Ba. & Be. 406. *Skey* v. *Barnes*, 3 Mer. 335. *Jones*

BLACKHALL *versus* COMBS.

CASE 13.

(*Upon an Appeal from a Decree at the Rolls.*)

THE defendant *Ann Combs* lent the plaintiff *Blackhall's* brother 120*l.* for which the brother, together with the plaintiff *Blackhall*, was bound to the defendant in a bond for the payment of this 120*l.* and interest.

2 Eq. Ca. Ab. 125. pl. 7. Where a bankrupt, after certificate allowed, is sued for a debt due before his bankruptcy, the court, on the circumstances of the case, will relieve, though it will not relieve on a matter purely of mis-pleading.

Afterwards in *March* 1711, the plaintiff *Blackhall*, the surety in the bond, became a bankrupt, and on a commission issued out against him, was accordingly found a bankrupt.

In *Easter* Term 1715, the defendant *Combs* arrested the plaintiff on his bond, and on the 28th of *June* following, a renewed commission of bankruptcy issued out against the plaintiff, who being found a bankrupt surrendered his effects, and submitted to be examined by the commissioners; but his certificate not being then allowed, he pleaded *non est factum* to the bond, whereupon a verdict and judgment was obtained against the bankrupt, and proceedings being also had against the bail, the bankrupt surrendered himself in discharge of his bail.

After this the commissioners of bankruptcy, and four-fifths [71] in number and value of the creditors, signed the certificate, and on notice in the *Gazette* to the creditors, on the 11th of *November* 1715, the bankrupt's certificate was allowed and confirmed by the then Lord Chancellor.

Upon which, this matter being disclosed to the Court of King's Bench, and affidavit made, that the cause of action in the bond was before the bankruptcy; that court made a rule that the bankrupt should be discharged out of prison, *nisi causa*, and no cause being shewn, the rule became absolute.

In *Easter* Term 1719, the defendant *Combs* brought a *scire facias* upon the judgment against the now plaintiff the bankrupt, who pleaded the act of the 5th of the late Queen for preventing frauds by bankrupts, and that the cause of action accrued before the defendant's bankruptcy; and issue being joined on this, the jury found a verdict against the then defendant the bankrupt, he (as was alleged) not being able to get the commission, or a copy thereof to produce at the trial, after which the plaintiff in the action had judgment.

On this the now plaintiff the bankrupt brought a bill to be relieved against the proceedings at law, and Lord Chancellor, on motion, granted an injunction.

BLACKHALL *v.* COMES.

Not long after, the cause came to a hearing before his honour the Master of the Rolls, who dismissed the bill, in regard the act of parliament touching bankrupts and their discharge, was to be pleaded, and taken advantage of at law; and this having been accordingly pleaded, and found against
[72] the bankrupt, there was no equity in the case, but it was all at law; for which reason the court, with great clearness, dismissed the bill.

From this decree the bankrupt appealed to Lord Chancellor, before whom, in support of the decree, it was objected, that the said act had prescribed in what manner the bankrupt was to take advantage of his discharge and certificate, (viz.) by pleading it; and if the bankrupt had not pursued this method, it was his own fault; that the defendant being a just creditor on bond for money lent, and which (as 'twas represented) she had earned at service for her livelihood, she had, at least, an equal equity with the now plaintiff; that this court ought not to assist against such a creditor, who had the law on her side, especially in a matter which seemed to be all at law; and a case (*a*) *ex parte Goodwin* was cited, where Lord *Cowper*, upon a petition, refused to relieve the bankrupt against whom judgment had been recovered purely upon a matter of mis-pleading.

(*a*) 2 Vern. 696. et vide 2 Vern. 325. 1 Vern. 119. accord. Sed vide 2 Vern. 147. contra. Vide etiam post, The Countess of Gainsborough versus Giffard. 424.

However Lord Chancellor, in the principal case, reversed the decree made by the Master of the Rolls, and relieved the bankrupt against this judgment at law.

His Lordship seemed to admit, that were the case only matter of mis-pleading, equity should not relieve; but said, it weighed with him, that this matter had been examined in the King's Bench, and the bankrupt discharged there; and by the same reason that one determination in a proper court, and in a proper method, would not bind, so also if there were eight, or ten, or twenty determinations, they would not be conclusive.

[73] That as to the mere merits, it was most plain, the bankrupt was one intended to be relieved within the act; the debt was incurred long before the bankruptcy; though this being a *scire facias* upon the judgment, the judgment might be said in law, to be the cause of the action, and that was after the bankruptcy. (*z*)

That the certificate not being obtained and made absolute,

(*z*) But see *Morrice* v. *Hankey*, post, 3 vol. 146. *Wright* v. *Nutt*, 1 T. R. 388. Tidd's Prac. 1099.

when *non est factum* was pleaded to the bond, this might excuse such plea. BLACKHALL *v.* COMBS.

That here had been a long acquiescence by the obligee herself, who had slept under the discharge made by the court of King's Bench many years; and her suit upon the *scire facias* seemed to be the undertaking of some enterprising solicitor, who had engaged to help her to this desperate debt.

Then it was of weight, that the plaintiff the bankrupt, had upon oath given up his all, and his examination had been no ways falsified; and if nothing was left to the bankrupt, what was the plaintiff at law contending for?

Let the now plaintiff be relieved, and have a perpetual injunction against the defendant. (1)

(1) Reg. Lib. A. 1721. fol. 401.

LOYD *versus* MANSELL. CASE 14.

THE plaintiff brought a bill to redeem, setting forth, that his late father being seised in fee of lands in *Pembrokeshire* of 50*l.* per annum, made a mortgage thereof to *J. S.* and that the defendant desired the plaintiff's father would consent that* this mortgage should be assigned to the defendant, who would help the plaintiff's father to a place, and be willing to take his interest out of the profits of the place.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 71. pl. 10. On suggestion of a gross fraud, the court will, upon an original bill, over-rule a plea of a decree, and a report made and confirmed thereon, if the suggestion of fraud be not denied.

That thereupon this mortgage was by the plaintiff's father's consent assigned to the defendant, who never helped the plaintiff's father to any place, but instead thereof, the defendant, the next term after the mortgage was forfeited, brought an ejectment against the plaintiff's father, and turned him out of possession; and the term next following, the defendant brought a bill against the plaintiff's father, who put in an answer to the bill, and then the defendant got a common bailiff, one of a scandalous character, to make an affidavit, that the plaintiff's father had left his habitation, and (as he believed and was credibly informed) was gone beyond sea; upon which affidavit, the now defendant got an order, that service of the then defendant's clerk in court might be good service; whereas the plaintiff's father was then living, and publicly appeared in the next county with his wife's relations; but upon this false affidavit, and order made thereupon, the cause was heard *ex parte*, and the report made *ex parte*, and confirmed abso- [*74]

LOYD *v.* MANSELL.

lutely, by which means the plaintiff's father became absolutely foreclosed, although the estate was of much greater value.

The defendant pleaded this decree and report, and both made absolute, signed and inrolled.

Lord Chancellor: All these circumstances of fraud ought to be answered; which the defendant has been so far from doing, that he only pleads that decree and report as a bar, which the plaintiff seeks to set aside; (z) and the decree being signed and inrolled, the plaintiff has no other remedy; and if these
[75] matters of fraud laid in the bill are true, it is most reasonable that the decree should be set aside.

Wherefore over-rule the plea, and let it not stand for an answer: and though it was objected, that according to this rule, a decree might be set aside by an original bill:

His Lordship replied, such a gross fraud as this was an abuse on the court, and sufficient to set any decree aside. (1)

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(1) So, *Richmond* v. *Tayleur*, ante, 1 vol. 737. *Galley* v. *Baker*, Ca. temp. Tal. 201. *Sheldon* v. *Fortescue*, post. 3 vol. 111. *Bradish* v. *Gee*, Amb. 229. (*y*).

(z) See Mitford, Pleading, 195. *Bayley* v. *Adams*, 6 Ves. 586. *Sanders* v. *King*, 6 Madd. 61. *Thring* v. *Edgar*, 2 S. & S. 274. *Pennington* v. *Beechey*. ib. 282.

(*y*) S. C. Kenyon, 73.

CASE 15.

An uninhabited country newly found out, and inhabited by the English, to be governed by the laws of England.

MEMORANDUM, 9th of *August*, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the privy council, upon an appeal to the King in council from the foreign plantations,

1*st*, That if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of *England;* though, after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the statute of *frauds and perjuries*, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind *Barbadoes;* but that,

A conquered country to be governed by

2*dly*, Where the King of *England* conquers a country, it is a different consideration: for there the conqueror, by saving

the lives of the people conquered, gains a right and property in such people; in consequence * of which he may impose upon them what laws he pleases. But,

MEMORANDUM. such laws as the conqueror will impose:

but until the conqueror gives them new laws, they are to be governed by their own laws, unless where these laws are contrary to the laws of God, or totally silent.

3*dly*, Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail. [*76]

See the case of *Blankard* versus *Galdy*, *Salk.* 411. (1)

(1) See also *Campbell* v. *Hall*, Cowp. 204. *Sprague* v. *Stone*, Doug. 38. (*z*)

(*z*) *Rex* v. *Vaughan*, 4 Burr. 2500. 143. *Forbes* v. *Cochrane*, 2 B. & C. *Attorney General* v. *Stewart*, 2 Mer. 463.

HILDYARD *versus* SOUTH-SEA COMPANY AND KEATE.

CASE 16.

Sir JOSEPH JEKYLL. 2 Eq. Ca. Ab. 232. pl. 12. 238. pl. 13. One transfers stock by virtue of a forged letter of attorney; the transfer to be void, and the right owner not hurt; and the dividends received under this forged letter of attorney, together with the stock, to be taken back from the assignee, and restored to the right owner.

THE plaintiff *Hildyard* was possessed of 700*l.* *South-sea* stock, and one *Ross* brought a forged letter of attorney to the *South-sea* company, impowering him the said *Ross*, as attorney to the plaintiff *Hildyard*, to transfer this stock to the defendant *Keate*; the transfer was for a valuable consideration, and this letter of attorney attested by two witnesses.

Whereupon the *South-sea* company transferred this 700*l.* stock to *Keate*, and paid the next dividend to him.

2. Eq. 138.
38. Ch. D. 148.
1908. 2. K. B. 214.

Afterwards the company were informed by the plaintiff *Hildyard*, that this letter of attorney was forged; upon which they stopped payment, and the plaintiff *Hildyard* brought his bill to have this stock transferred back, and also to have the dividend, which had been paid to the defendant, accounted for to him.

Objected for the defendant *Keate*, that he was a fair and innocent purchasor, and whatever advantage the plaintiff could have at law against him, there was certainly no reason for equity to lend any assistance; that it would be an extreme hardship, if the defendant should run the risk of such letter of attorney; especially after the *South-sea* company had pursuant thereto, transferred the stock to him, as in this case they actually had done; and with regard to the dividends, it was [77]

HILDYARD *v.* SOUTH-SEA COMPANY.

said to be still more unreasonable, that these, when once paid to him, should by the aid of a court of equity be afterwards taken from him.

Sed per Cur. When the defendant *Keate* bought by letter of attorney, it was incumbent upon him, and at his peril, to see that such letter of attorney was a true one; it was more his concern and in his power to inquire into the reality of this letter of attorney, than of any other person, so that the rule of *caveat emptor* is in this case properly applicable to him.

On the other side, it is plain, that though the defendant *Keate* has been in fault, yet here can be no pretence of fault or neglect in the plaintiff *Hildyard;* and therefore it would be most apparently unjust to let him suffer: a forged letter of attorney was, as to him, the same as no letter of attorney; consequently his stock which has been transferred from him without any authority at all, ought to be restored to him.

Then as to the company, they were but instruments and conduit-pipes; or like the lord of a manor, in case of a surrender of a copyhold, where if there should be a forged letter of attorney, impowering one of the copyholders to surrender to
[78] the use of *J. S.* and thereupon the attorney, in the name of the copyholder, should surrender to the use of *J. S.* who should be accordingly admitted by the lord, yet this admittance would be void; and so is the transfer of this stock to the defendant *Keate;* and it would be of public use, that those who accept of a transfer of stock under a letter of attorney, should be obliged to take strict care of the validity and reality of such letter of attorney, for no other person can be so properly concerned to do it.

Let the company take this 700*l. South-sea* stock from the defendant *Keate,* and restore it to the plaintiff *Hildyard;* and let the defendant *Keate,* and not the company, pay back the dividend, which he has without good authority received, to the plaintiff, and let the defendant *Keate,* who has been in default in this case by reason of his neglect, pay both to the company and the plaintiff their costs. (1)

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(1) Reg. Lib. A. 1721. fol. 424. The whole stock sold under the forged letter of attorney was 770*l.* of which 500*l.* was sold to *Keate* and 270*l.* to *Burman,* who both treated for the purchase with a public broker at the *South-sea* house, and were informed by the broker that he sold it for *John Ross.* The cause appears to have been heard on bill and answer; and no particular circumstances were stated or relied upon, as taking the case out of a general rule.

The decree is as follows.—"His "Honor doth order that the *South-* "*sea* company, do vacate the transfer

BURTON *versus* PIERPOINT.

CASE 17.

MR. WILLIAM *Pierpoint* of *Nottingham*, upon his marriage with Mrs. *Darcy*, settled his real estate on himself for life, remainder to his wife for life, remainder to the first, &c. son of this marriage in tail male, remainder to his own right heirs. 2 Eq. Ca. Ab. 627. pl. 7. 1911. 1. Ch. 279.

Mr. *Pierpoint* had two sons by this marriage, and having a small estate in fee-simple unsettled, by his will devised his wife's jewels to her, and likewise the use of the plate to her for her life; after which, by his said will he devised all his real estate, subject to his debts and legacies, and after his debts and legacies paid, to his kinsman the Marquis of *Dorchester*, grandson and heir apparent of the Duke of *Kingston*, and in 1706, the testator died leaving two infant sons.

At the time of the testator's death, the real and personal assets were not sufficient for the payment of his debts; whereupon the creditors insisting to be paid, the testator's widow gave up her jewels, and her plate, and twenty-five guinea purses (being her dowry money) which were all applied towards the debts: but in the decree obtained for the sale of the real estate, and for an account of the personal, as well as real assets, the widow's claim of her jewels, plate, and dowry money was saved to her. [79]

In 1719, the testator's two sons died under age, and without issue, whereby the estate-tail of the settled lands expired, and the reversion in fee falling in, became liable by the will to the debts. And now these points were determined by the Lord Chancellor.

" of 500*l.* stock to the defendant " *Keate*, and the transfer of 270*l.* to " the defendant *Burman;* and also the " stock respectively added thereto " after the rate of 33*l.* 6*s.* 8*d.* per cent. " pursuant to the act of parliament, " and give the plaintiffs credit in their " books for the whole 770*l.* stock, and " also the said additional stock, and to " pay the plaintiffs all the dividends " which have accrued due for the same. " —And the said *South-sea* company " are to be at liberty to prosecute the " defendants *Keate* and *Burman*, in " the plaintiffs' name, for the recovery of what has been paid to the " defendants *Keate* and *Burman*, on " account of the said 770*l.* stock, and " the said additional stock, the said " company indemnifying the plaintiffs " in respect thereof.—And the plaintiffs are to pay the said *South-sea* " company their costs, and the defendants *Keate* and *Burman* are to pay " the plaintiffs their costs, and also the " costs paid over by the plaintiffs to " the company."—But this decision does not appear to have been followed in any other instance. Et vide contrà *Ashby* v. *Blackwell*, Amb. 503. (*z*)

(*z*) S. C. 2 Eden. 299. *Davis* v. *Bank of England*, 2 Bing. 393.

BURTON *v.* PIERPOINT. Dowry-money cannot be claimed by the widow against debts.

1*st*, That as to the dowry-money claimed by the widow, it could not be *bona paraphernalia;* for these are confined to the ornaments of her person; nor could it (as had been urged) be part of her separate estate, it being given (1) to herself, and not to her trustee, and the wife cannot have a (2) separate property in a personal thing without a trustee; but this dowry-money, in the nature of it, was rather a gift to the church, the said dowry-money being to be laid upon the book. See *Gibson's Codex Juris Ecclesiastici*, Part I. p. 519.

Bona paraphernalia not allowed to the widow, where there are not assets at the death of her husband, though contingent assets afterwards fall in; but a specific legacy shall.

2*dly*, That with respect to the claim of the jewels, as *bona paraphernalia* the widow could have no title to them, and that this case differed from that of *Tipping* versus *Tipping*, (*a*) regard being to be had here to the time of the death of the testator, when the real and personal assets were not sufficient for the payment of the debts; nay, at the time when these jewels* were applied to the debts, there was a deficiency of assets, real and personal, for the payment thereof; and though afterwards upon a remote contingency (such as was not to be presumed or waited for, (viz.) a death without issue, assets had fallen in, yet that this should not alter the case as to the *bona paraphernalia;* for the same might not have happened until twenty or thirty years after the death of the testator, nor (possibly) until after the death of the widow, when the end and design of the widow's wearing her *bona paraphernalia*, in memory of her husband, could not have been answered; and therefore it was reasonable, that this should be reduced to a certainty, (viz.) that if there should not be assets real and personal at the testator's death, or, at least, at the time when the jewels were applied to debts, then the jewels should be liable.

(*a*) Ante vol. i. 729.

[* 80]

But, 3*dly*, If the creditors, by judgment of the testator, should after his death have taken the jewels in execution, when the heir, or executor, or trustees, had other assets to have paid such debts, this would have been a default in the trustees, for which the widow ought not to suffer, as to her *bona paraphernalia;* but in the present case here was no default, nor any thing done, but what ought to have been, in regard the just creditors of the testator were not to be kept out of their debts, nor the jewels, which were legal assets, detained from them, in expectation of that which might never happen; a subsequent contingency of assets falling in, must not exempt the jewels

(1) Sed vide *Graham* v. *Londonderry*, 3 Atk. 393, and the cases there cited by Lord *Hardwicke*.

(2) Sed vide *Bennet* v. *Davis*, post 316.

from debts, which, at that time, both at law and in equity, they were liable to answer. (1)

4thly, However, in the present case, forasmuch as there was an express bequest of the jewels to the widow, notwithstanding, that, at the time of the death of the testator, there were not assets, either real or personal, yet since afterwards, though by a remote accident, assets had happened, the court held there could be now no inconvenience to any creditor or others, and that this legacy should be paid, and the intention of the testator performed, and the rather, for that here the real and personal assets were by the will made liable to the debts and legacies.

[81]

If a creditor by bond exhaust the personal estate, a legatee shall stand in his place, and be paid out of the real estate.

Especially it being the constant rule, that a legatee, where the real estate is made liable to pay debts, on the creditors exhausting the personal assets, shall stand (2) in the place of the creditors, and be paid out of the land; and that this was stronger in the case of a specific legacy (the principal case) which was to be preferred in payment before a pecuniary legacy.

Also, in the principal case, all the legatees were decreed to be paid, before the residuary legatee (the Marquis of *Dorchester*) took any thing.

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(1) Vide *Tipping* v. *Tipping*, ante 1 vol. 730. *Ridout* v. *Earl of Plymouth*, 2 Atk. 104. *Snelson* v. *Corbet*, 3 Atk. 369. *Graham* v. *Londonderry*, 3 Atk. 393. *Lord Townshend* v. *Windham*, 2 Vez. 7. and particularly *Tynt* v. *Tynt*, post 542.

(2) *Clifton* v. *Burt*, ante 1 vol. 678. *Haslewood* v. *Pope*, post 3 vol. 323.

TERM. S. MICHAELIS, 1722.

CASE 18.

POWELL *versus* HANKEY AND COX.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 151. pl. 11. 724. pl. 1.

The wife after the death of her husband, not admitted in equity to recover the arrears of her separate estate.

THE wife before her marriage, by the consent of her then intended husband, conveyed her real estate to trustees to such uses, as she, notwithstanding her coverture, should appoint, and assigned all her mortgages and bonds to her separate use; besides which she had 200*l.* exchequer-annuities assigned by her intended husband to her trustees, in trust for herself for her jointure.

Vide post. 341. Thomas *v.* Bennet.

1918. I. K 77.

After the marriage she constantly permitted her husband to receive the interest of all these securities and bonds, without making any complaint, either to the debtors that paid the money, or to her trustees.

Also the wife consented to sell 10*l.* a year, part of her land of inheritance, for 200*l.* which the husband having received, therewith founded a charity for poor widows, and gave a bond for it to the wife's trustees, to be paid to them within three

[83] months after the wife's death, for the benefit of her executors.

About ten years after the marriage the husband died, and his executors subscribed the 200*l.* exchequer-annuities into the *South-sea*, without the privity of the wife, who was then in the country; but she afterwards having notice thereof, and when the affairs of that company were in their prosperity, insisted upon having a proportion of the benefit of that subscription:

Decreed by Lord Chancellor, 1*st*, That as to any part of the principal money due upon any of the mortgages and securities, the husband's executors ought, out of the assets, to make that good with interest from the death of the husband. But,

2*dly*, That with regard to any of the interest on the mortgages and securities received by the husband during the coverture, as it was against common right, that the wife should have a separate property from the husband, (they being both

in law but as one person) so all reasonable intendments and presumptions were to be admitted against the wife in this case; and forasmuch as she had, for ten years together, permitted the husband to receive this interest, without making the least objection either to the husband, or to the debtors who paid the money, or to her own trustees, it should be therefore intended, that she consented to the husband's receipt of this interest; that the contrary construction might have been a hardship upon the husband, who (probably) depended on the wife's permitting him to receive this as a gift; and on such a presumption might have lived in a more plentiful manner, the comfort whereof the wife must have shared in: and if she, ten or twenty years afterwards, should be allowed to make her husband a debtor for all this money, (which she might do by the same reason, as now after his death to charge his executors,) this might ruin the husband, or, in case of his death, prove equally prejudicial to his children.

[84]

And though it had been pretended, that the wife was kept in awe, and hindered from making her demand, by reason of the husband's passionate temper, yet the court observed, that this was not proved; and though that were really the case, still the wife might have applied, and complained to her own trustees, whom she must be supposed to have had a confidence in, as persons who would have protected her against any resentment of her husband, had there been occasion; whereas nothing of this was done.

3dly, As to the case of separate maintenance, the court took notice, that the husband's maintaining the wife, barred the wife's claim in respect (1) thereof; so if there should be a provision for the wife's separate use for clothes, if the husband finds those clothes, the wife's claim will be thereby barred; that in case of the wife's separate maintenance, if this be not

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(1) *Thomas* v. *Bennett*, post. 341. *Fowler* v. *Fowler*, post. 3 vol. 355. In *Lord Townshend* v. *Windham*, 2 Vez. 7. and *Peacock* v. *Monk*, 2 Vez. 190. the general rule of the court is said to be, that an account of pin-money shall not be carried back beyond a year; yet under particular circumstances it may be otherwise, as in *Countess of Warwick* v. *Edwards*, 1 Eq. Ca. Ab. 140. pl. 7. *Ridout* v. *Lewis*, 1 Atk. 269. (*z*)

(*z*) See *Aston* v. *Aston*, 1 Vez. 267. *Smith* v. *Lord Camelford*, 2 Ves. jun. 698. *Squire* v. *Dean*, 4 Bro. C. C. 326. *Parkes* v. *White*, 11 Ves. 225. *Dalbiac* v. *Dalbiac*, 16 Ves. 116. *Brodie* v. *Barry*, 2 V. & B. 36.

POWELL *v.* HANKEY.

demanded by her, she will be concluded, even where she has no other person to demand it of but her husband, which probably she might be afraid to do; but that the principal case was not so strong, in regard there the wife might have demanded it from her own trustees; neither was it material, whether the allowance or maintenance-money was provided out of that estate which was originally the husband's, or (as in the principal case) out of what was the wife's own estate, for that in both cases, the wife's not having demanded it for several years together, should be construed a consent from her, that the husband should receive it; and as to this point of the arrears of separate maintenance not being demanded by the wife in his life-time, the case of Judge (*a*) *Dormer* and the *Bishop of Salisbury* was cited.

[85]

(*a*) Hill. 1712.

As to the fourth point, (viz.) the wife's accepting this bond for the payment of 200*l.* within three months after her death, for the use of her executors, the Court held, this should bind the wife, and was a waiving of the interest of the 200*l.* during her own life; for that it was impossible to misapprehend so plain and express words as were in the condition of the bond, (viz.) to be paid within three months after her death: and if she would avoid this bond, it was incumbent upon her to prove, that some fraud was made use of in gaining her acceptance thereof; that this being her separate estate, she must *primâ facie* be looked (1) upon as a feme sole; and it was, as

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(1) *Allen* v. *Papworth*, 1 Vez. 163. *Grigby* v. *Cox*, 1 Vez. 517. *Peacock* v. *Monk*, 2 Vez. 190. *Hulme* v. *Tenant*, 1 Bro. C. C. 16. *Pybus* v. *Smith*, 3 Bro. C. C. 340. (*z*)

(*z*) S. C. 1 Ves. jun. 189. *Fettiplace* v. *Gorges*, 1 Ves. jun. 46. Lord *Rosslyn* was inclined to narrow the rule laid down in the principal case; *Milnes* v. *Busk*, 2 Ves. jun. 498. *Whistler* v. *Newman*, 4 Ves. 129. *Mores* v. *Huish*, 5 Ves. 692; but the latter cases have restored its authority. *Sperling* v. *Rochfort*, 8 Ves. 164. *Wagstaff* v. *Smith*, 9 Ves. 520. *Parkes* v. *White*, 11 Ves. 209. *Witts* v. *Dawkins*, 12 Ves. 501. *Sturgis* v. *Corp*, 13 Ves. 190. *Essex* v. *Atkins*, 14 Ves. 547. *Acton* v. *White*, 1 Sim. & S. 429. But where a feme covert enters into a contract which in form amounts only to a general personal demand, her separate estate will not be charged, *Hulme* v. *Tenant*, ub. sup. and 2 Dick. 560. *Duke of Bolton* v. *Williams*, 2 Ves. jun. 138. *Jones* v. *Harris*, 9 Ves. 486. *Power* v. *Bailey*, 1 Ba. & Be. 49. *Francis* v. *Wigzell*, 1 Madd. 258. *Greatly* v. *Noble*, 3 Madd. 79. *Aguilar* v. *Aguilar*, 5 Madd. 414; unless she has shewn such to have been her intention, as, *e. gr.* by giving a security, either alone, or with her husband. *Norton* v. *Turvill*, post. 144. *Standford* v. *Marshall*, 2 Atk. 68. *Bullpin* v. *Clarke*, 17 Ves. 365. *Greatly* v. *Noble*, ub. sup. *Stuart* v. *Kirkwall*, 3

if a feme sole had accepted such bond, which would have bound her; also it was a reasonable thing to suppose, that the wife contributed to this charity, it being to widows, consequently to her own sex, and by this manner of contributing to it what she gave was of very little value, it being but out of her life, after her husband's; which, if she had not happened to survive, would have amounted to nothing at all, so that there was the more reason she should be bound by this bond.

With respect to the other point, the Court held the wife to be bound by the subscription of these exchequer annuities into the *South-sea;* the same being done by the executors, who had the legal estate; (for the assignment of such annuities upon the plaintiff's marriage had never been registered in the Exchequer, and consequently were void,) wherefore this subscription by the executors was to be looked upon as of equal force with a subscription made by guardians, which would bind an infant; but then it being done without the consent of the widow, the same should be made good out of the personal estate of the testator; nay, and if that should prove deficient, out of his real estate; forasmuch as he had covenanted for himself and his heirs, to make good these annuities of 200*l.* a year to his wife; and this was so ordered, notwithstanding she was represented, as having insisted afterwards, upon receiving the imaginary benefit of this subscription; for that looked rather like loose discourse, than any thing else, at least, it would be too hard, for that reason, to deprive her of the provision, which was stipulated for her on her marriage.

[86]

His Lordship admitted, there was a clause (*a*) in the act of parliament, for making good all subscriptions made by trustees, executors or guardians; but this was (he said) for the benefit, quiet and security of the *South-Sea* Company, which this decree would not break into; on the other hand the executors themselves offering by their answer to make this good to the

(*a*) Vide 6 Geo. 1. Cap. 4. sect. 23.

Madd. 387. As to the process against a feme covert having a separate estate, see note (A) to *Newsome* v. *Bowyer*, post. 3 vol. 37. As to the execution against the separate property, see *Nantes* v. *Corrock*, 9 Ves. 189. *Hulme* v. *Tenant*, *Francis* v. *Wigzell*, ub. sup. As to the administration of it after the decease of the feme covert, *Norton* v. *Turvill*, post, 144. It is to be observed also, that a feme covert may be restrained by the terms of the instrument which gives her separate property from alienating or anticipating it. *Sockett* v. *Wray*, 4 Bro. C. C. 483. *Hyde* v. *Price*, 3 Ves. 437. *Richards* v. *Chambers*, 10 Ves. 580. *Parkes* v. *White*, 11 Ves. 221. *Heatley* v. *Thomas*, 15 Ves. 596. *Brandon* v. *Robinson*, 18 Ves. 434, 1 Rose, 200. *Lee* v. *Muggeridge*, 1 V. & B. 118. *Jackson* v. *Hobhouse*, 2 Mer. 483. *Worrall* v. *Jacob*, 3 Mer. 269. *Ritchie* v. *Broadbent*, 2 J. & W. 456.

POWELL *v.* HANKEY.

wife, notwithstanding that two of the residuary legatees were infants, and so could not be bound by the consent of the executors, yet such way of answering by the executors, shewed plainly enough what was the intention of all parties touching the subscription of the annuities, (viz.) that the wife should not be deprived of the benefit of her settlement, who did not seem to have had any means of compelling the executors to let her into the benefit of the subscription of these annuities, had there been any.

Costs ordered to the widow out of her husband's assets.

CASE 19.

ANONYMOUS. *

Lord MACCLESFIELD.

Where the general traverse is omitted at the end of the answer, yet the answer is good, and not to be suppressed as improper.

IT was moved to suppress an answer as irregular or improper, in regard it wanted the general traverse at the end, (viz.) "without that, that any other matter in the bill contained is "true;" and it was objected, that without this traverse, there was no issue joined.

[*87] *Sed Cur. contra:* It does not appear, but that in the principal case the whole bill, and every clause in it is fully answered, and then the adding the general traverse is rather impertinent than otherwise; and if issue is taken upon this general traverse, it is a denial only of every other thing not answered before by the answer.

And Lord Chancellor said, that this general traverse seemed to him to have obtained formerly, and in ancient times, when the defendant used only to set forth his case in the answer, without answering every clause in the bill; and for that reason it was the practice for the defendant to add at the end of the answer this general traverse.

TERM. S. HILL. 1722.

WALLIS *versus* BRIGHTWELL.

CASE 20.

Lord MACCLESFIELD.

THE testator *Brightwell* being seised in fee of lands in *Ireland*, and he and his wife living in *England*, by his will made in *England* devised his lands in *Ireland* to a trustee (who also lived in *England*) for 500 years, in trust out of the rents and profits to pay 80*l.* per annum to his wife for life.

2 Eq. Ca. Ab. 62. pl. 4. One by will made in England devises an annuity in trust for his wife out of lands in Ireland, the testator and his wife and the trustee residing in England, the annuity shall be paid in England, and the estate bear the charge of the return.

Insisted on, that the fund for this payment being lands in *Ireland*, and no place appointed where the money is to be paid, this 80*l.* per annum annuity ought to be paid in *Irish* money, which is less in value than *English* money, (our shillings going there for 14*d.*) (*z*) and by the same reason there ought to be a deduction for the charge of remitting the money from *Ireland* to *England*.

But by *Lord Chancellor:* The will being made in *England*, and the husband, and wife, and trustee all living in *England*, and this being a provision for a wife too, the 80*l.* per annum shall be intended 80*l.* per annum of that country where the will was (*a*) made; it cannot be conceived that the testator thought of sending his wife every year to *Ireland* to fetch her annuity.

[89]

(*a*) See Phipps v. Earl of Anglesea, vol. 1. 696.

If one by will made in *England* gives a legacy of 80*l.* it must be intended *English* money; and it will be the same thing though charged on land in *Ireland*; and by the same reason that a single payment of 80*l.* will be taken to be *Eng-*

So if one in England gives by will a legacy out of lands in Ireland, the legacy shall be paid in England and in English money.

(*z*) By St. 6 G. 4. c. 79, the currency of *Ireland* is assimilated to that of *Great Britain*.

WALLIS *v.* BRIGHTWELL.

lish money, so shall an annual payment of 80*l.* receive such construction. (1)

And this is still stronger, in regard it appears on the proofs that the testator had made leases of part of his *Irish* estate, reserving just so much rent to be paid in *London* free from taxes, as would be sufficient to pay all the annuities given by the will.

Wherefore the plaintiff had a decree to be paid her 80*l.* annuity in *English* money, without any charge of remittance, and with costs.

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(1) And in *Pierson* v. *Garnet* (*z*) before Sir *L. Kenyon,* Master of the Rolls, on the 6th of *March* 1786 his Honor held this point to have been conclusively determined by *Phipps* v. *Earl of Anglesea*, and *Wallis* v. *Brightwell.* Et vide *Saunders* v. *Drake*, 2 Atk. 465. *Malcolm* v. *Martin*, 3 Bro. C. C. 50. (*y*)

(*z*) 2 Bro. C. C. 41.

(*y*) *Cockerell* v. *Barber*, 16 Ves. 461.

CASE 21.

Ex parte RYSWICKE.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 116. pl. 2. A. draws a bill payable to B. on C. in Holland, for 100*l.* C. accepts it, afterwards A. and C. become bankrupts, and B. receives 40*l.* of the bill out of C.'s effects, after which he would come in as a creditor for the whole 100*l.* out of A.'s effects; B. permitted to come in as a creditor for 60*l.* and the master directed to see whether the other 40*l.* was paid out of A.'s effects in C.'s hands, or out of C.'s own effects; if the latter, then C. is a creditor for this 40*l.* also; but if out of A.'s effects, then 40*l.* of the 100*l.* is paid off.

UPON the petition of the creditors of Mrs. *Cock*, the bankrupt, to be let in before the commissioners for their whole debts: the case was, Mrs. *Cock* drew a bill of exchange in *England* upon her brother *Vandermash* in *Holland*, for 100*l.* payable to *J. S.*: *Vandermash* accepted the bill, and both he and Mrs. *Cock* became bankrupts, and out of the effects of *Vandermash* so much money was paid by the assignees of the commission of bankruptcy against him to his creditors, as amounted to 40*l.* per cent.

[90] And now some of the creditors of Mrs. *Cock* petitioned Lord Chancellor, that they might come in as creditors of Mrs. *Cock* for the whole 100*l.*; alleging, that though this should be granted them, yet the effects of Mrs. *Cock* would not extend to satisfy them their just debt of 100*l.* even including the 40*l.* per cent. which they had before received out of *Vandermash's* estate.

Obj. The creditors by this bill of exchange having received 40*l.* per cent. out of *Vandermash's* estate, there remains but

60*l.* per cent. due, and therefore such creditors ought not to come in any otherwise, than as creditors for 60*l.* in regard 40*l.* of the debt has been paid off and discharged; and it cannot be material, whether this was paid off by *Vandermash* the drawee, or by Mrs. *Cock* the drawer, forasmuch as there remains but 60*l.* due upon the said bill of exchange (*z*); and if the construction were otherwise, it would disappoint the intention of the statutes of bankrupts, which order an equal distribution of the bankrupt's estate among all the creditors.

Lord Chancellor: It is material, whether this payment of 40*l.* per cent. made by the assignees of the commission against *Vandermash*, was out of the effects which Mrs. *Cock* had in *Vandermash*'s hands; for if so, it would be, as if paid by Mrs. *Cock* herself; and if paid by Mrs. *Cock* herself, then there can be but 60*l.* per cent. due, and consequently the creditors of Mrs. *Cock* shall come in for no more than this remaining 60*l.* (1)

On the other hand, if the 40*l.* per cent. paid by the assignees of *Vandermash*'s estate, was really paid out of *Vandermash*'s effects, then *Vandermash*'s estate is as a creditor for this 40*l.* and the creditors of Mrs. *Cock*'s estate must come in creditors for the whole 100*l.* and to be taken as trustees for the 40*l.* debt paid out of *Vandermash*'s effects. [91]

To make this plainer, suppose *A.* was principal in a bond, and *B.* surety in the said bond, for the payment of 100*l.* and *A.* and *B.* becoming bankrupts, *A.* had paid 40*l.* the creditors of *A.* or *B.* would come in only for the remaining 60*l.* but if *B.* the surety had paid the 40*l.* or if it had been paid out of the effects of the said surety, then *B.* the surety, or his estate, had

(1) Where several debtors for the same debt become bankrupts, the creditor shall be at liberty to prove his whole debt under each commission, if at the time of *proving* his debt he has not actually received any satisfaction in respect thereof, and he shall receive his dividends under each commission upon the whole debt, so that he does not in the whole receive more than 20*s.* in the pound, *Cooper* v. *Pepys*, 1 Atk. 106. *Ex parte Wyldman*, 2 Vez. 113, and 1 Atk. 109. S. C. (*y*)

(*z*) So *Walwyn* v. *St. Quintin*, 1 Bos. & P. 658. Secùs, where the part payment was made by an *indorser*; ib. and *Johnson* v. *Kennion*, 2 Wils. 262.

(*y*) *Ex parte Blackburne*, 10 Ves. 204. *Ex parte Rushforth*, 10 Ves. 409. *Ex parte Martin*, 2 Rose, 87. *Ex parte Rathbone*, Buck, 215. A dividend declared under one commission, though not received, must be deducted from the amount to be proved under another commission. *Ex parte Leers*, 6 Ves. 644. *Ex parte Bank of Scotland*, 2 Rose, 197. 19 Ves. 310. See *Ex parte Reid*, Buck, 239.

Ex parte RYSWICKE.

been creditor for this 40*l.* and consequently the creditors or assignees under the commission of bankruptcy against *A.* the principal, though the 40*l.* had been paid by the surety, yet must have come in for the whole 100*l.* and as to the 40*l.* they must have been accountable to *B.* the surety. (1)

Therefore in this case, let the creditors of Mrs. *Cock*, come in for the 60*l.* per cent. and let it be inquired out of whose effects the 40*l.* per cent. was paid by *Vandermash*'s assignees; and if the 40*l.* per cent. shall appear to have been paid out of *Vandermash*'s own effects, then let the creditors of Mrs. *Cock* come in for the whole 100*l.* out of which they must answer 40*l.* per cent. to the creditors of *Vandermash*.

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(1) Sed quære—for in the first place it does not appear in what manner the obligee can prove the whole debt, having in fact received a part; besides which, it is clear that if the surety or his estate should pay the whole or a part of the debt *before* the bankruptcy of the principal, such payment might be proved as a debt under the commission against the principal, without any circuity; and if the payment should be made *after* the principal's bankruptcy, the surety or his assignees would not be entitled to any benefit under the commission, not being damnified at the time of the bankruptcy. *Ex parte Marshall*, 1 Atk. 129. *Kettier* v. *Raynes*, Cooke's Bankrupt Laws, 176. (*z*)

(*z*) S. C. 1 Bro. C. C. 384, 1 Cox, 105. But now by St. 6 G. 4, c. 16. s. 52. any person who at the issuing the commission shall be *surety* or *liable for any debt* of the bankrupt, or *bail* for the bankrupt either to the sheriff or to the action, may, if he shall have paid the debt, or any part thereof in discharge of the whole debt, although he may have paid the same after the commission issued, if the creditor shall have proved his debt under the commission, stand in the place of the creditor as to the dividends and all other rights upon such proof, or if the creditor shall not have proved under the commission, may prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he became surety, &c. after the act of bankruptcy, provided he had not when he became surety, &c. notice of any act of bankruptcy, or that the bankrupt had stopped payment. As to the extent of the words "liable for any "debt of the bankrupt," see *Ex parte Lobbon*, 17 Ves. 334, 1 Rose, 219. *Ex parte Yonge*, 3 V. & B. 31, 2 Rose, 40. *Wood* v. *Dodgson*, 2 Rose, 47, 2 M. & S. 195. *Ex parte Taylor*, 2 Rose, 175. *Ex parte Ogilvy*, ibid. 177. *Vansandau* v. *Corsbie*, 8 Taunt. 550, 3 B. & A. 13. *M'Dougal* v. *Paton*, 8 Taunt. 584. *Hoffham* v. *Fourdrinier*, 5 M. & S. 21. *Moody* v. *King*, 2 B. & C. 558. which were decided upon the 49 G. 3. c. 121. s. 8. That statute did not expressly mention *bail*, and they were held not to be included under the words "persons liable," *Hewes* v. *Mott*, 6 Taunt. 329. *Newington* v. *Keeys*, 4 B. & A. 493. Nor were sureties for the payment of annuities included; *Welch* v. *Welch*, 4 M. & S. 333. *Watkins* v. *Flanagan*, 1 Bing. 413. but these are now provided for by 6 G. 4. c. 16. s. 55.

OATS, *Lessee of* SIR WILLIAM JOLLIFF, *versus* ROBINSON.

CASE 22.

Lord MACCLESFIELD. 1 Str. 461. Where cognizee of a statute extends lands in one county, which extent is afterwards returned and filed, yet all the lands of the cognizor, though in other counties, shall be made liable upon application in Chancery.

SIR *William Wolesley* acknowledged a statute-staple before the Chief Justice of the Common Pleas to Sir *William Jolliff* for 22,000*l.* to be paid at *Candlemas* then next.

On this statute-staple an extent was sued out, directed to the sheriff of *Staffordshire*, by virtue of which, and of an inquisition taken thereon, the said sheriff extended diverse lands of the cognizor in *Staffordshire*, and this extent was returned and filed in the petty-bag office. [92]

Afterwards Sir *William Jolliff* sued out another extent upon this statute-staple, directed to the sheriff of *Nottinghamshire*, who, upon inquisition, extended other lands, and thereupon a *liberate* was sued out and returned, and Sir *William Jolliff* brought an ejectment.

Upon which there being a full and perfect extent before, and the same being filed, it was held that this was a satisfaction, and no new extent could be afterwards made upon the same statute; and it was said to be the folly of the cognizee to file his extent, until he knew he had lands sufficient, for which were cited the following authorities. 1 *Inst.* 290. 1 *Vent.* 41, 42. *Hob.* 52. *Forster* versus *Jackson. stat.* 32 *H.* 8. *cap.* 5. *Cro. Jac.* 338, 339. 1 *Lev.* 92. 1 *Roll's Rep.* 8, 9, 10. *Godbolt*, 257. 2 *Bulstrode*, 97. 3 *Lev.* 269. *Cro. Eliz.* 9, 10.

But on a petition to Lord Chancellor, his lordship gave leave that a special prayer should be entered upon the record of extent, shewing, that the cognizor of the statute, Sir *William Wolesley*, died seised in fee of several lands in several counties, (viz.) in *Staffordshire*, *Nottinghamshire*, &c. and praying, that the cognizee Sir *William Jolliff* might be at liberty to sue out extents upon the lands in all these counties.

And his lordship said he would give the cognizee of the statute liberty to enter upon the record what prayer he pleased; for that the intention and agreement of the cognizor who gave this security, was, that all his lands (were they in ever so many counties) should be bound by the statute, and consequently it would be most unreasonable to confine the cognizee to the lands of the cognizor in any one county; for this would be to defeat [93]

OATS *v.* ROBINSON.

that security which the party himself had agreed to give, and had actually given. (*z*)

Whereupon this special prayer was entered: and the cognizee recovered the land in *Nottinghamshire*, notwithstanding his former extent filed of the land in *Staffordshire;* and though afterwards there was another petition preferred to set aside this order, insisting, that the defendant, against whom the ejectment was brought for the land in *Nottinghamshire*, was a mortgagee, and without notice, though subsequent to the statute, yet his lordship affirmed the first order with great clearness, saying that the law was rather nice upon an *elegit* on a judgment, because of the word [*elegit;*] but that this word was not made use of in an extent; and had it not been insisted on, that the defendant was poor, and an honest creditor of the cognizor, the Court was inclinable to have given costs upon the second petition.

(*z*) See the stat. 8 G. 1. c. 25. s. 4. and note to *Underhill* v. *Devereux*, 2 Williams's Saunders, 70. c, d.

3. Tu. Rep. 164.

CASE 23.

RERESBY *versus* NEWLAND.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 644. pl. 15. The trust of a term was for raising a portion for a daughter, in default of issue male, payable at eighteen or marriage, or as soon after as the same might conveniently be raised: the mother died leaving no son, and leaving only one daughter; the Court was of opinion, that the portion could not be conveniently raised by sale of the reversion.

THIS was a bill brought by the plaintiff and his wife, for his wife's portion of 3000*l.* and a maintenance secured in a marriage-settlement, by a * term of 500 years commencing in default of issue male of the bodies of the plaintiff's wife's father and mother, for providing portions for the daughters of the marriage, to be raised by rents and profits, or by sale or mortgage, and to be paid at the daughter's attaining the age of eighteen or marriage. (1)

[*94]

(1) " Or within as short a time after " as the same should or might be *con-* " *veniently* raised; the elder of the " daughters to be first paid—and for " the yearly maintenance of such " daughter or daughters *until her or* " *their portion or portions should or* " *might be raised as aforesaid*, if there " should be but one, the yearly sum of " 50*l.* and if two or more, the yearly " sum of 35*l.* a-piece, to be paid to " such daughter or daughters upon " *Michaelmas-day* and *Lady-day*, the " first payment thereof to begin upon " such of the said feasts as should first " happen *next after the death of the* " *father*, it being the true intent and " meaning of the parties that no yearly " maintenance *should be due to or* " *raised for any such daughter or* " *daughters during the life of the fa-* " *ther.*"

Provided that no maintenance shall commence, until the death of the father, but the same to begin at the first quarter-day after.

Provided that (1) if all the daughters die before eighteen or marriage, then the 500 years term to be void.

With power to the father, with consent of the trustees, to revoke all the uses.

The mother died without leaving a son, and leaving only one daughter, who married the plaintiff without her father's consent, and with her husband brought this suit for the recovery of her portion of 3000*l.* praying a sale or mortgage of the reversionary term in her father's life-time for the raising the same.

For which purpose the cases of *Greaves* and *Maddison* in *Raym.* and 2 *Jones*, and particularly that of *Sandys* and *Sandys* (*a*) were cited; and it was moreover urged, that the settlement expressly saying that the portion should be paid at eighteen or marriage, which should first happen, the same was plainly due.

(*a*) Vide vol. 1. 707.

That the trust being to raise the portions by mortgage or sale, this reversionary term must be either mortgaged or sold.

As also the proviso having said, that if the daughter should die before her age of eighteen or marriage, then the portion was not to be raised; this was a strong indication, that if the daughter lived to eighteen or marriage, she should be entitled to her portion.

[95]

That if the settlement had intended the reversionary term should not be sold, it would certainly have been so expressed, especially when there was a provision therein, that no maintenance should be raised in the father's life-time.

Then it was observed, that the daughter was here a purchaser of her portion, by the mother's marriage, who appeared to have brought 2500*l.* and for 2500*l.* paid so long since, it was but a reasonable bargain, to be bound to pay 3000*l.* at so distant a time from the marriage, as this portion became due; and it must be supposed to have been the contract or bargain made by the wife's relations, that this portion, with the addition of 500*l.* at such a distance of time, should be paid back to the only child of the marriage, if a daughter, at her age of eighteen or marriage.

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(1) "Provided that if the defendant "should die without any daughter by "the said *Mary*, living at his decease, "and she should not then be ensient "of a daughter which should after- "wards be born and live, or if all the "daughters," &c. as above. 2 Bro. P. C. 487.

That as the chief end of securing the portion, was to prefer the daughter in marriage, so if this was not done at a seasonable time, (and which the settlement had fixed at eighteen,) it might prove wholly insignificant; for the father might (and probably would) marry again, and neglect his daughter by his first wife, who might also grow to be fifty years old in the lifetime of her father, and consequently past marriage before such time as she would become entitled to her portion.

[96] *Lastly*, As to the power of revocation, it was insisted, that when the portion became actually due, (as here it was) it would be then too late for the power of revocation to devest what was actually vested.

Attorney-General contra: This case is not the same with *Sandys* and *Sandys*, but extremely different; but if it were, the Court finding the growing mischief that has proceeded from the resolutions entitling the daughters to their portions at eighteen, (out of these reversionary terms) by tempting them to disobedience, to throw off all their dependence upon their fathers, and to ruin themselves by rash and unequal matches, ought at length to make a stand against such mischief.

Though the deed of settlement says, that the portion is payable at eighteen, yet this is not all which is said in the deed, for the other parts thereof shew, that the portion was not intended to be raised until after the father's death, and the settlement is to be taken and considered all together, and with all the contingencies.

One of the provisoes is, that if there shall be no daughter living at the father's death, and the wife not *ensient*, then the term for raising portions is to be void; now one of these contingencies *has* happened, (viz.) the wife was not *ensient* at his death, the other *may* happen, (viz.) there may be no daughter living at the time of the death of the father; and therefore this portion must not be raised, until this latter contingency be also determined; and the proviso means no more, than that if there shall be no daughter living, or *in ventre sa mere*, at the father's death, then no portion shall be raised.

[97] It is true, it may be thought a hard case, supposing the daughter should marry, and die before the father, leaving several children, that yet she should have no portion; but this must be left to the breast of the father, who cannot be supposed to be unkind to his own child.

On the other hand, in the present case, there is an instance of disobedience in the daughter, by her having married without her father's consent, an instance, which, probably, proceeded

from her dependence upon being able to recover her portion in despite of her father.

And this contingency, (viz.) whether or no a daughter shall be living at the time of her father's death, makes the case to be exactly like the case of *Corbet* and *Maidwell*. (*a*)

(*a*) Salk. 159.

As to the case of *Sandys* and *Sandys*, there was no proviso that the term should be void, if no daughter living at the death of her father, nor any such power of revocation, as in the present case, and the father is to be considered as much a purchaser of this power of revocation, by making the limitations of the settlement, as the daughter a purchaser of her portion.

Mr. *Talbot* on the same side: As to the inconvenience of the daughter's staying an unreasonable time for her portion, the same inconvenience must have been if the mother had lived, as well as the father, there being no pretence to say, that if the father and mother had been both living, then the portion could have been raised.

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The whole deed must be taken together, else you will have the intention of the party by halves.

Besides, the words of the clause for paying the portion are, "that the same shall be paid at the daughter's age of eighteen "or marriage, or as soon after *as conveniently may be*," so that it is consistent with the deed, if the portion be paid as soon after the daughter's age or marriage as conveniently may be, and surely it cannot be said to be conveniently paid, when there is no other way proposed for doing it, but by selling a reversionary term, to the ruin of the family.

The payment of the maintenance must, in the course and nature of it, precede the payment of the portion, and no maintenance being to be paid until after the death of the father by the express words of the settlement, there consequently can be, before that time, no payment of the portion.

The hardship in this case, on the family, is so visible, that if it were but a doubtful point, or in any sort unsettled, or varying from former resolutions, the Court ('tis apprehended) will strain hard to make a distinction, in order to preserve the family.

To which it was replied by Mr. *Lutwyche*, That as to the case of hardship, and that what was prayed by the plaintiffs would tend to the ruin of the family, the same might be, and in fact had been urged in all cases where the Court had decreed the sale of reversionary terms for raising portions for daughters, in the life-time of the father.

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But that it would be as much a hardship to take it the other way, (viz.) if the daughter should marry suitably, and die in the father's life-time, leaving many children, that this daughter should have no portion provided for her by the settlement.

That it had been very easy, had the parties so intended it, to have inserted a proviso in the settlement, that the portion should not be raised in the father's life-time, especially, when (as observed before) it was provided that no maintenance should be raised in the father's life-time.

The Court will not go farther than warranted by precedents, in selling reversionary terms to pay portions.

Lord Chancellor: The case of *Greaves* versus *Maddison* is a strange one, and not common sense; I will go just as far, and not one jot further, than former resolutions have gone, for raising portions for daughters by the sale of reversionary terms; and whenever such a case happens, (I mean when a daughter applies in order to have the portion raised in the father's life-time) I will study and labour to find out a difference between that case and the former, in order to discountenance such suits; the sense of the nation seems to be with me, in this case, by there being generally, (*a*) now a-days, a clause inserted in settlements, to prevent the sale of a term for raising portions, in the life-time of the father.

(*a*) Vide vol. 1. in the case of Butler v. Duncomb. 457.

It is hard, that a court of equity should encourage a daughter, just when she comes to fourteen, or perhaps twelve years of age, to say to her father, "Come, I am fit for my portion, pray pay "it me, or I will marry, and then I can compel the raising of "it by the sale of your estate."

What disobedience will this breed in a daughter? what rash and unequal marriages will this produce? Accordingly I have observed, that in most of these cases (as in the principal case) the daughter has married without the consent of the father, which surely is fit to be prevented.

[100]

But it is objected, the father will not in a reasonable time raise this portion.

Resp. But of the two which is fittest to be trusted, the father, or his infant daughter? doubtless he must be presumed, out of his natural affection to his daughter, to be willing to do her right.

But the present case differs from the former cases where the portion has been recovered by sale of reversionary terms, this portion being to be paid at eighteen or marriage, or as soon after as the same shall or may be conveniently raised, so that it is not to be raised, until it can be done with conveniency; now in my opinion, it cannot conveniently be raised by selling a reversion, which will incommode the family to that degree as to

ruin the estate; for which reason I think it cannot be conveniently raised until the death of the father.

Besides, there is a proviso which makes this contingent during the father's life-time, and that is another reason why it cannot be raised, (viz.) a proviso, that if the father dies without leaving a daughter, or his wife *ensient* with a daughter, then the portion is not to be raised; which proviso imports no more, than that if, at the death of the father, there shall be no daughter born, or *in ventre sa mere*, then no portion is to be raised.

[101]

It is true, so far has happened, that there can be no daughter *in ventre sa mere* at the father's death, no posthumous daughter; but still there may be no daughter living at the father's death; so that there is a contingency still subsisting which prevents the portion from becoming due, and makes this case resemble that of *Corbet* and *Maidwell*.

As to the proviso which says, that if the father provides for the daughter a portion equal to what is secured by the settlement, then the term to be void; by this, it seems, it must be intended, if the father provides such portion payable at such time as the portion by the settlement is made payable, (viz.) at eighteen, if the portion be construed to be then payable.

Where there is a power in the trust term to raise portions, for the husband with consent of trustees to revoke all the uses, this suspends the portion.

With respect to the power of revocation, it is still a subsisting power, and consequently suspends, and prevents the portion from being as yet payable, because the father, by consent of the trustees, may yet revoke; he may revoke at any time before the portion is raised and paid; and it can be no objection to say, that the right to this portion is vested in the daughter; for suppose there had been a son born, then a right to the remainder would have vested in such son, and yet there can be no doubt, but that the father, with the consent of the trustees, might have revoked this vested remainder, and by the same reason may he with consent, &c. revoke this term which secures the portion; and if the term falls, all the trust thereof must fall also, and consequently the trust for raising the portion.

Indeed it has been objected, that it would be a breach of trust in the trustees to join in such revocation.

[102]

But I think it may not be only a justifiable, but commendable thing in the trustees, under some circumstances, to consent to such revocation; as suppose the daughter should be drawn in to marry some very unworthy man, who should use her in a most barbarous manner, and the daughter should afterwards die without issue, upon which the husband should sue

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for the portion; in this case, it would be very reasonable in the trustees, to join with the father in revoking these uses; or suppose the daughter should have left children by such marriage, it would be reasonable for the trustees, by consenting to a revocation, to prevent the portions going to the husband, and (if practicable) to carry it to the children of the daughter, so that this power seems to be still a subsisting power, which there may be hereafter very good reason to put in execution.

For these reasons, I think the portion remains as yet liable to a contingency, and therefore not to be raised until this contingency is out of the case; which cannot be during the life of the father. (1).

This decree was afterwards affirmed by the House of Lords. (2)

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(1) Vide *Butler* v. *Duncombe*, ante, 1 vol. 448.

(2) 2 Bro. P. C. 487.

CASE 24. MR. JUSTICE EYRE *versus* COUNTESS OF SHAFTSBURY.*

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 710. pl. 3. 755. pl. 4. A guardianship devised to three, without saying, "and to the survivors or survivor of them," yet the survivor shall have it.

THE late Earl of *Shaftsbury*, by his will dated 10th *November* 1710, devised the guardianship of the person and estate of his infant child (the present Earl) to Mr. Justice *Eyre* and two others (since deceased) without saying *and to the survivor of them;* and this devise of the guardianship was until the child should come to 21 years of age.

[*103]

Lord *Shaftsbury* died beyond sea, and the infant Earl was now twelve years of age, when Mr. Justice *Eyre*, perceiving that his lordship had not a proper governor provided for him by the Countess his mother, and that the person who was ordered to attend him as his gentleman, was not a fit person for that purpose, petitioned the Lord Chancellor, that he, as sole surviving guardian, might have the ordering, as he should think proper, of such governor, gentleman and other servants to attend the said infant Earl, and that the person of the said infant Earl might be delivered over to the petitioner.

On the behalf of the Countess it was insisted by the solicitor general, Mr. *Lutwiche*, Mr. *Cowper*, and Mr. *Talbot*, that the guardianship being devised to three, without saying *and to the survivor of them*, the same did not survive; that it was but a bare authority, and no interest, in regard no profit could be

made thereof; that if a power were given to three, and one of them should die, the survivor could not execute such power; that if two were made committees of a lunatic, on the death of one of them, the commitment would determine; that this was a trust annexed to the person, and not assignable, nor was it reasonable it should survive, forasmuch as the testator might think it proper to trust three, but not to invest a smaller number with a charge of that importance.

Also it was said, that if the infant Earl should die without issue under age, in such case the late Earl by his will had given an annuity of 500l. per annum to Mr. Justice *Eyre*, which made it improper, that he alone should be intrusted with the person of the infant Earl, who would be gainer on his dying without issue and under age; that the will having appointed three guardians to the infant, it was the same thing, as if the testator had appointed those three jointly, and then it was plain, that if one should die, the survivors could not act; that according to auditor *Curl's* case, (11 *Co.* 2. *b.*) where an office is granted to two, on the death of one of the grantees the office determines.

[104]

And though it might be attended with some inconvenience, were such guardianship or authority to determine on the death of one of the persons intrusted, yet it must be allowed to have been in the power of the testator to have prevented this inconvenience, by limiting the guardianship to the survivor by express words. *Salk.* 465.

It was moreover urged, that this was a matter of trust, for every guardianship was a (*a*) trust; that the Crown, as *parens patriæ*, was the supreme guardian and superintendent over all infants; and since this was a trust, it was consequently in the discretion of the Court, whether or no they would do so hard a thing, as to take away an infant under thirteen years of age, from so careful a mother as the Countess was; that the tender calls of nature were on the mother's side; and then there were two physicians, (Doctor *Robinson* and Doctor *Friend*), who both testified, that the infant Earl was of a tender and sickly constitution; so that at least the Court might refuse to grant this in a summary way, or otherwise than upon a bill.

(*a*) Vol. 1. 704. Duke of Beaufort v. Berty, & Frederick v. Frederick, 721.

Also with regard to the servants, it was represented to be a very hard thing to turn away such as the Countess had experienced to be good servants, and to take persons in their room, whom she had no experience of, particularly, that Doctor *Stubbs* the governor came in at first, with the approbation of

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EYRE *v.* Countess of SHAFTSBURY.

Mr. Justice *Eyre*, and that he was a man of learning, probity, and piety, and a clergyman.

On the other side it was said, that this guardianship was not devised to three *jointly*, but to three until the infant Earl should come to twenty-one; that a guardian had not only a bare authority, but also an interest, for he might bring a writ of ravishment of ward, or might make a lease during the minority of the infant as was determined in the case of *Shopland* versus *Rydler*, *Cro. Jac.* 55. 98. so that guardians had an interest coupled with their authority, and consequently the office would survive.

It was true, it could not be granted over; no more could the office of executorship; but yet there could be no question, but that if there had been two executors, and one should die, the other would take the whole executorship as survivor.

And as to the objection, that there was no profit in the guardianship, and therefore it should not survive, the same way of reasoning would hold in the case of an executorship, for that was barely a trust, and no ways profitable; notwithstanding which, being a legal interest, it would survive. It was likewise said, that in case where three guardians were appointed, if this were supposed to be but a joint authority, and consequently not to survive, it would prove a great inconvenience, and in a good measure frustrate the intention of the person appointing them.

As to what was held in auditor *Curl*'s case, (viz.) where an office has been usually granted to two, and one of them dies, that this is a determination of such office, the reason must be
[106] supposed to be, because they both make but one officer, as in the case of the sheriffs of *Middlesex*.

That with regard to the 500*l.* per annum given to Mr. Justice *Eyre*, in case of the infant's death without issue, and under age, that could be no objection in case of a testamentary guardian appointed by the party himself, whatever it might be where the guardian was to be appointed by the Court; for where the testator himself says, that *J. S.* shall be guardian of his son, and by the same will also declares, that the said guardian shall have the *whole* estate, in case the child should die within age, surely that would be good; much more shall the devise in our case, which is but a small part of the estate.

Then as to the objection of hardship, from the guardian's being impowered to impose servants, governors, &c. who, when put upon the young Lord by such guardian, would probably not

regard the Countess, as having no dependence upon her, this might be as well turned the other way, (viz.) that if they were put in by the mother, they would have no regard to the guardian, who yet was intended by the will to be *in loco parentis*, and to supply the father's place.

That Dr. *Stubbs* the governor might be a good scholar, and a pious man, and yet it would not necessarily follow, that he was a proper governor to attend the young Earl to court, or to noble families, or at the exercises of dancing and riding, which it was fit his Lordship should be acquainted with.

Besides, it was of great consequence, in regard such servants are apt to flatter their young masters, and to entertain their thoughts with such things as would be rather pleasing than useful to them. [107]

Lastly, With respect to the tenderness of the young Lord's constitution, that was, however, of late grown stronger, and he being now upwards of twelve years of age, this was the proper crisis for forming his mind, and instilling into him a taste of those noble qualities, and that spirit, which became a person of his high station, in order to make him useful to his country; and this being the proper time, surely it was reasonable to trust Providence in these cases, and to send the young nobleman to some public school.

Lord Chancellor: The father by the (*a*) statute has a right to dispose of the guardianship of his child until twenty-one, and having done so here, it will be (1) binding, unless some misbehaviour be shewn in the guardian, in which case it being a matter of trust, this court has a superintendency over it.

(*a*) 12 Car. 2. cap. 24.

But as to the objection, that this right of guardianship does not survive, because it is not said in the will in express terms, that it shall go to the survivor, there seems to be no colour for it, because where several guardians are appointed by a will, each of them seems to be a complete guardian, like the case where there are two or three church-wardens of a parish, each of them is a distinct church-warden; and it would be mischievous, and of very ill effect, if where there are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do any thing; and yet this must be the consequence, if a guardianship devised to several should be [108]

1. Rus. 529.

(1) Vide *Dillon* v. Lady *Mountcashell*, 3 Bro. P. C. 341. (*z*)

(*z*) S. C. 9 Mod. 135, nomine *Morgan* v. *Dillon*.

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taken to be one joint naked authority; such construction would make the act of little force; a guardian has an authority coupled with an interest, and may bring a writ of ravishment of ward on the infant's being taken from him; and though it is true, that the damages recovered shall by the statute go towards the benefit of the ward, yet the declaration must lay it *ad dampnum* of the guardian the plaintiff.

The reason of auditor *Curl*'s case, where, on the office of auditor being granted to two, without saying *and to the survivor*, such office, on the death of one, was held to be determined, was, because in such case both made but one officer, as the two sheriffs of *Middlesex* make, as to their office, but one person. In the present case, here is a plain right placed and vested in Mr. Justice *Eyre* as the surviving guardian, and who, every one is assured, will well execute such trust, which it will be impossible for him to do, without being allowed to place and choose the governor, gentleman, &c. to attend upon and take care of this young nobleman.

And though Dr. *Stubbs* may be a good, learned, and pious man, yet he may not be so fit to attend the young Earl to all places, for instance, to courts, places of exercise, and diversions, &c. at which it may be proper for his lordship to appear.

But I must differ from Mr. Justice *Eyre*, as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery.

[109] Wherefore *per Cur'*: Discharge Dr. *Stubbs* from being governor, as also Mr. *Bennet* from being gentleman, and deliver the infant into the hands of his guardian Mr. Justice *Eyre*, who desired the young Earl might dine with him.

But Lord Chancellor said, that this was in confidence that the judge should return him to his mother the Countess at night, for that as yet, the Court would not make any order touching the custody of the Earl's person.

Afterwards on the great seal's being taken from the Earl of *Macclesfield*, and placed in the hands of three Lords Commissioners, on 18 *March* 1724, Mr. Justice *Eyre* (lately made Lord Chief Baron of the Exchequer) exhibited his petition to the Lords Commissioners, setting forth the former proceedings, and that the infant Earl, who was now just fourteen years of age, and had been married to Lady *Susanna Noel*, daughter to the Countess of *Gainsborough*, was detained from the petitioner; that such marriage was without the consent or privity of the said Lord Chief Baron the surviving guardian; therefore the petitioner thought it his duty to lay these things before

the Court, praying, that the custody or tuition of the infant Lord might be granted to him, and that the Court would make such order touching this matter, as they should think proper.

Upon this the Countess Dowager of *Shaftsbury* petitioned the Lords Commissioners, that the order of the late Lord *Macclesfield*, declaring the right of guardianship to belong to the Lord Chief Baron *Eyre*, and directing the person of the infant Earl to be delivered to the said Lord Chief Baron, might be set aside,

Also the infant Earl petitioned the Lords Commissioners, [110] insisting, that the guardianship of his lordship given by the will, was determined by the death of two of the guardians, and praying that his lordship, being now of the age of fourteen years, might be at liberty to choose his guardian.

On hearing these petitions, the Court ordered a sequestration, unless cause, both against the Countess [dowager] of *Shaftsbury*, and against the Countess of *Gainsborough*, for their contempt in contriving and effecting this marriage without the consent of the guardian, and without applying to the Court.

And the person of the infant Earl was ordered to be restored by the Countess [dowager] of *Shaftsbury* to the Lord Chief Baron, it being the opinion of the Court, that though the declaration made by the late Lord Chancellor, that the right of guardianship did belong to the Lord Chief Baron as surviving guardian, and the order made thereupon, was ever so erroneous, yet that the same was a good order until reversed, and consequently it was a contempt (1) to break it.

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(1) So in *Potts* v. *Norton* at the Rolls, 24th April, 1792, the testator by his will left considerable legacies to the infant children of his brother, and also an annuity to the brother himself, making it his particular request to his brother, that he would commit the education of the children to his, the testator's executors, and revoking the gift of the said annuity in case the brother should refuse to comply. Several of the children were taken from the brother by the executors without any objection being made, and were placed by the executors at different schools; and the brother received his annuity. Upon an application to the Court for maintenance for the infants, it was ordered, that the Master should inquire whether the brother was willing to commit the education of the children to the executors, and in that case the Master was to inquire what was proper to be allowed for their maintenance. The Master reported that the brother had appeared before him, *and consented* thereto; and this report was afterwards confirmed, and certain sums allowed for maintenance. The brother having afterwards taken away two of the children from the schools where they had been placed, the executors by their present petition prayed that he might be ordered to replace them. The brother appeared to the petition, and insisted that he had never given his consent that the care of his children should be taken from him; and it was strongly insisted on his behalf, that the Court had no jurisdiction to take a

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On the 15th *May*, the three Lords Commissioners, (viz.) Sir *Joseph Jekyll* Master of the Rolls, Mr. Baron *Gilbert*, and Mr. *J. Raymond*, having heard this matter solemnly argued by counsel on both sides, gave their judgment, which was delivered by the Lord Commissioner *Jekyll*, that the Court were all of opinion, the sequestration against the Countess of *Shaftsbury* ought to be absolute.

The marriage of a ward without the consent of the guardian, is a ravishment of the ward, 2 *Inst.* 440, and aggravated in this respect, that after such ravishment by marriage, the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher.

The punishment inflicted by the law on such as married a ward without the consent of the guardian.

By the statute of *Westminster* 2. *cap.* 35, it is enacted, that if one be guilty of ravishment, either of a male or female ward, if the ward be restored, though not married, the ravisher shall be punished with two years' imprisonment; but if the ward be not restored, or if he be restored and be married, the party guilty of such ravishment (if he cannot make satisfaction for the marriage) shall be punished by imprisonment for life, or by abjuring the realm, at the discretion of the court where he is tried; so that a ravishment of ward became an offence not only against the guardian, but against the King: and whereas, on the ward's being married, the ravisher was to be punished by perpetual imprisonment, or by abjuring the realm; this shews the greatness of the offence, by the grievousness of the punishment.

[111]

And the matter of marrying infants without the proper consent of guardians, is provided against, both at law and in this court, especially the latter, it being notorious, that a court of equity entertains no greater jealousy of, nor shews more resentment against any thing, than the unlawful marriage of infants.

In the case of the marriage of a lunatic, (viz.) that of Mr. *Packer's* marrying Mrs. *Ash*, the Court (*a*) committed Mr. *Packer*, the parson, and others that were their agents, and *Packer* continued in custody for a considerable time; and infants and lunatics may be compared together, both of these being unable to take care of themselves.

(*a*) Vide Preced. in Chan. 412.

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child from his parent without the parent's consent, (as to which vide *Duke of Beaufort* v. *Berty*, ante, 1 vol. 705, and *Creuse* v. *Hunter*, there mentioned.) But his Honour said, he would not go into this question while the Master's report of the brother's consent remained in force—the brother must make such application as he should think fit, to take off the effect of that proceeding—but for the present his Honour ordered the brother to replace the children.

In case where an infant is committed by the Court to the custody or care of any one, such committee gives a (*b*) recognizance, that the infant shall not marry without leave of the Court, which form is very rarely altered, and on special circumstances; so that if the infant marries, though without the privity, or knowledge, or neglect of the committee, yet the recognizance is in strictness, forfeited, whatever favour the Court upon application, may think fit to shew to such committee, when he appears not to have been in fault.

On this court's committing the custody of an infant to the care of any one, such committee enters into a recognizance, that the infant shall not marry without leave of the court.

(*b*) Vide vol. 1. Dr. Davis's case, 698.

In Lord *Sommers*'s time, Mr. *Goodwin* married an infant (Mrs. *Knight*) and was committed, and this commitment was followed by an act of parliament for dissolving the marriage.

So on (*c*) Sir *Edward Hannes*'s daughter and heir, who was an infant, being inveigled from her guardian Dr. *Waugh*, and married to one *Willis*, though Mrs. *Hannes* was not taken from a guardian assigned by the Court, yet, in that case, both Mr. *Willis*, and the parson, and the agents, were all committed by the Master of the Rolls, Sir *John Trevor*, and the order afterwards confirmed by Lord *Harcourt*; and as this Court punishes the instruments where such marriage is had without the consent of the guardian, so if there be only an apprehension, that the infant will be married unequally, either by the guardian, or by his neglect, a court of equity will interpose, and send for the infant, and commit him to the custody of a proper person, or relation, in order to prevent such danger; as was done in the case of the infant Lady *Catherine Annesley* by Lord Chancellor *Harcourt*, and likewise in another case, (viz.) that of Mr. *Vernon* of *Staffordshire*, by Lord *Macclesfield*. (1)

(*c*) 22 Mali 12 Annæ Reginæ, Hannes versus Waugh, at Knightsbridge. See the discourse of the judicial authority of the Master of the Rolls, p. 104.

[113]

But the present case is still of a higher nature, as it is the case of a peer of the realm, in whose education the public is interested; and where the guardianship of him is devised by a peer of the realm, (viz.) by the will of the late Lord *Shaftsbury*.

As to the objection that has been made to the order of this Court, that there are no words therein, that the infant shall not be married without the consent of the guardian:

Resp. The Court could not suppose, or foresee, that any person would marry the infant without the guardian's consent; and for that reason, there was no express provision against it in the order; but still this prohibition is implied, (viz.) that no person, without the leave of the guardian, should marry this infant; besides, by the same reason that these words ought

(1) Et vide Lord *Raymond*'s case, Ca. temp. Tal. 58. *Smith* v. *Smith*, 3 Atk. 304.

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to be inserted, the order should likewise have provided, that no person should take away, or ravish this ward from the guardian, &c. all which things are surely implied; but further, it is a sufficient answer to this objection, that such negative words are never inserted in the order.

But then it is objected, here is no disparagement in this marriage; forasmuch as the birth of the noble lady to whom Lord *Shaftsbury* is married, and also her quality, are equal to those of her husband; and she has had the advantage of being educated under the Countess of *Gainsborough* her mother, a lady of great honour, virtue, and quality.

[114] *Resp.* Admitting all this to be so, yet it may be reasonably supposed, that if the infant Earl had staid till he had attained his age, and could have made a jointure and settlement, in such case his lordship might have had a better portion.

But in reality, though there be no disparagement, yet this is only by way of extenuation, and can never be urged as a justification; for it is the marriage without the consent of the guardian, that constitutes the offence, so that such marriage having been to one of equal degree and fortune, can at most tend but to extenuate.

And it is observable, that the disparagement of the ward was not where such ward without the guardian's consent married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree, for which see the statute of *Merton*, *cap.* 6 & 7, 2 *Inst.* 89. 92.

Object. The punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage having been once solemnized and perfected, the same cannot be afterwards rescinded or dissolved.

Resp. The like objection might be made, though the marriage were ever so much to the disparagement of the ward; but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of wards.

[115] *Object.* This marriage is by the Countess the mother of the infant Earl, who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward.

Resp. The right of a testamentary guardian takes place of a guardianship by nature; by the express words of the act of parliament the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

Object. There is no instance of any one case, where a complaint has been against an infant's mother, for taking away her own child.

Resp. The Lords *Selkirk* and *Orkney*, guardians of the infant Duke of *Hamilton*, petitioned against the Duchess of *Hamilton* for taking away the infant Duke out of their custody, and their complaint was received; upon which the Court would have proceeded against the mother, but the guardians could not make out their right of guardianship, by reason of some defect in the instrument under which they claimed.

So that all these objections being answered, the Court are of opinion, that the sequestration against the Countess [dowager] of *Shaftsbury* ought to be made absolute.

As to the case of Lady *Gainsborough*, that seems to differ; and here the question is, whether the Countess of *Gainsborough*'s consenting that her daughter should be married to the infant Earl, be not a contempt?

8 *Edw.* 3. *page* 52. The case was, a writ of ravishment of ward was brought against four men and a woman, the men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter; upon which *Hirle*, C. J. gave the rule, that the woman was equally guilty with the four men, of the ravishment of the ward; the marriage of the infant, without the consent of the guardian, constituting the offence; and though the guardian be not appointed by the Court, nor any commitment made by the Court of the infant, yet have those been punished, who have married the ward without the consent of the guardian, as appears from the above cited case of Mrs. *Hannes*, where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir *Edward Hannes* the father's personal estate, and for an allowance of maintenance for the infant. [116]

Whereas in the principal case, the decree goes something further, as it directs that the will of the late Earl of *Shaftsbury* should be performed, part of which will is, that the infant Earl should be under the care and guardianship of the persons named therein.

In 3 *Co.* 38. (*Ratcliff*'s case) it was resolved that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward, against any one for taking away his heir apparent, male or female, and for marrying such heir, and that it is not material, of what age such heir then was;

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and as the ancestor might bring such action for taking away and marrying the heir, so also might the guardian for taking away and marrying the ward.

It does not appear, that the late Earl of *Gainsborough* left any testamentary guardians of his children, so that the Countess was guardian of them by nature, the marriage of her

[117] daughter belonged to her, consequently, it is to be presumed, that she married her daughter to the infant Earl, at least if she did not, she may purge herself by oath.

But it is material, that the Lord C. B. *Eyre*, the guardian of the infant Earl, has not in his petition, made out any direct charge, or prayed any thing against the Countess of *Gainsborough*, and possibly the Court may not be bound, *ex officio*, to punish for a ravishment of a ward, where there is no complaint.

The Court has the care, but not the guardianship of infants, and the Lord C. B. *Eyre* is not a † guardian appointed by the Court, but by the will of the father, in which respect the Court is the less concerned.

And though the *stat.* 12 *Car.* 2. *c.* 24, says, that a testamentary guardian may maintain an action of ravishment of ward, if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian.

So that in this case, forasmuch as the testamentary guardian has not complained of, or prayed any redress against Lady *Gainsborough*, the Court will do nothing against her, but discharge the order of sequestration with respect to her. (1)

And now we come to the petition of the infant Earl of *Shaftsbury*, where it is first objected, that though the Court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship, unless the matter be brought judicially before them, by bill, answer, and proofs.

[118] *Resp.* In this case, here are a bill and answer, and both the will, and the devise of the guardianship, are set out by the bill, whereupon the decree says, *that the trust of the will shall be performed*, one of which said trusts is the guardianship of the infant.

† Vide the case of Goodall v. Harris, post. 562.

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(1) As to the punishment of contempts in marrying infant wards of the Court, vide Mr. *Herbert's* case, post. 3 vol. 116.

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It is not material that the Earl was defendant, for so it was in the case of Mrs. *Hannes*, who was married to Mr. *Willis*, without the consent of the guardian; and this Court may, upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard the care of all infants is lodged in the King as *pater patriæ*, and by the King this care is delegated to his Court of Chancery.

That right which the king has as pater patriæ, to take care of his subjects in cases of charities, idiots, lunatics, and infants, falls under the direction of the Court of Chancery, which in consequence thereof hath used, upon petition only, without any bill or decree, to make orders touching the determination of such right.

In *F. N. B.* 232, the King is bound of common right, and by the laws to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are uncapable to take care of themselves, are provided for by the King as *pater patriæ*, and there is the same reason to extend this care to infants. (1)

This is the reason given in the writ *de idiotá inquirendo*, which the King issues out to take care of him, who *regimini sui ipsius, & bonorum, & terrarum suarum minime sufficit*, which reason also appears in the writ *de lunatico inquirendo*, and in 4 *Rep.* (*Beverley*'s case) infants, as well as idiots, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves.

In like manner, in the case of charity, the King *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of *Eliz.* relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney General's name for the establishment of charities. [119]

Also in the case of (*a*) *Berty* and Lord *Falkland*, the Lord *Sommers*, in delivering his opinion, takes notice, that several things are under the care and superintendency of the King, as he is *pater patriæ*, and instances in all charities, idiots, lunatics, and infants. (*a*) 2 Vern. 333.

Indeed several acts of parliament have made alterations in some cases of this nature, which so far stand altered, and no further; but unless there be express words in an act of parliament for that purpose, the original jurisdiction of this Court remains as before; but there is not any one act that has taken

(1) But the cases of lunatics and infants are distinguished by Lord Hardwicke, in *Ex parte Whitfield*, 2 Atk. 315. (*z*)

(*z*) So *Ex parte Phillips*, 19 Ves. 118.

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away the original jurisdiction of this Court with respect to this care and superintendency in the case of infants, charities, idiots and lunatics. Since the statute which took away the court of wards, the jurisdiction of wardship (*a*) returns to the Court of Chancery; and it appears by the *Register* 21. *b.* 198. that a writ may issue out of this Court to remove the guardian of an infant, and to put another guardian in his stead.

(*a*) 2 Vern. ubi. supra.

Though an infant cannot bring an account against his guardian until his coming of age, yet a third person may bring such bill for an account, even during the minority of the infant.

The law is particularly favourable to, and careful of an infant's interest, and though the infant himself cannot bring an account against the guardian, until his coming of age, yet a third person may bring a bill for an account against the guardian, even during the minority of the infant. (1)

[120] So in all decrees against infants, even in the plainest cases, a day must be given them to shew (†) cause when they come of age.

Lord *Sommers* has often said, that this Court should be always open for petitions; and orders on petitions, in regard to the guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship.

Thus in the case of Lord *Tenham* and *Barrett*, there was no bill depending in this Court, but only a petition, desiring that Lady *Tenham* the mother, being a papist, might not have the guardianship of the infant (*a*) determined on petition against the mother; upon which an appeal was brought to the House of Lords, before whom it was never objected, nor once thought of, that this Court could not, on a petition only determine the right of guardianship; and on the appeal the (2) Lords also determined the right against the mother.

(*a*) 18 March 1718.

Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the

† Vide vol. 1. 504. *Fountain* v. *Caine & al'*; where it appears that an infant on his coming of age, and before the decree made absolute, may put in a new answer. See also the case of Sir *John Napier* versus Lady *Effingham*, post. 401.

(1) So Earl of *Pomfret* v. Lord *Windsor*, 2 Vez. 484.

(2) 2 Bro. P. C. 539.—Et vide Harg. Co. Litt. 88. note (16.) (*z*)

(*z*) On the appointment of guardians on petition where no suit has been instituted, see *Ex parte Whitfield*, 2 Atk. 315. *Ex parte Salter*, 3 Bro. C. C. 500. Dick. 769. *Ex parte Earl of Ilchester*, 7 Ves. 348. *O'Keefe* v. *Casey*, 1 Sch. & L. 106. *Corbett* v. *Tottenham*, 1 Ball & Be. 60. *Ex parte Mountfort*, 15 Ves. 445. *Ex parte Myerscough*, 1 Jac. & W. 151. A guardian was appointed on petition to an orphan infant without property, for the purpose of consenting to her marriage, *In Re Woolscombe*, 1 Madd. 213; but this is rendered unnecessary by the St. 4 G. 4. c. 76. s. 14. 16.

whole case arising thereon, there can be no need of a bill in equity, no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill.

But in the last place it is objected, that upon the wording of this will, the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying *and to the survivor of them*, and that this is a joint personal confidence wherewith three are intrusted, wherefore by the death of any one, the guardianship is determined; and to prove that a guardianship is personal, it has been urged, that it is not assignable, nor will it go to executors or administrators. [121]

Resp. I admit a guardianship is not assignable, neither will it go to executors or administrators; but for all that, it is coupled with an interest, and is not a naked authority: I admit also it has been said, that where a naked authority is given to two, if one dies, the survivor cannot act; (*z*) but the same book, (viz.) 1 *Inst.* 112, 113, says that where an authority is coupled with an interest, it does survive. In the case of *Gardiner and Sheldon*, (*Vaughan* 182.) the case of a guardian is compared to that of an executor or administrator, which is not assignable, but yet survives; and though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship, by appointing an executor by his will, yet the case of a guardianship devised to two, is strictly like the case of an † administration granted to two, (especially where the debts amount to as much as the assets;) for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship, it will not go to his executors or administrators, but to the surviving administrator; such an administrator is accountable to the creditor for every thing, as much as the guardian is to the infant; such an administrator can make no profit. [122]

And that a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action and avow in his own name, may make (*a*) leases during the minority of the

(*a*) 2 Roll.Abr. 41. pl. 3.

† See 2 Vern. 514. *Adams* versus *Bucklund*, where on an administration being granted to two, and one dying, it was held to survive to the other; and more particularly the case of *Hudson* v. *Hudson*, 30 *July* 1735, where Lord *Talbot* determined accordingly on hearing civilians. (1)

(1) Cas. temp. Talb. 127.

(*z*) So *Peyton* v. *Bury*, post. 628.

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infant, and may grant copyholds (*b*) even in reversion, as *dominus pro tempore.*

A guardianship is not properly an office, nor to be resembled (for instance) to the office of a parkership; for the former has an interest in the infant's estate; but a parker has no right or interest in the park, or land enclosed therein, and the owner of the land may determine such office by disparking the park, or killing the deer; and whereas in *Pop.* 204. it is said, that where the Lord *Grey* committed the custody of his son to four, and one of them died, the authority determined; this case is put upon the clause of the statute of 4 & 5 *Phil. & Mar. cap.* 8, which says "that whosoever takes a damsel unmarried, "and under the age of sixteen, out of the custody of their "father or mother, or any such person to whom the father "in his life-time, or by his will, or by any act in his life-time "has appointed the same, shall be subject to the pain of two "years' imprisonment, or to the payment of such fine as the "Court shall appoint." So that by that act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as the guardian has, he had but a bare authority.

[123]

As to auditor *Curl*'s case, that depended upon the statute of the 32 *H.* 8. *cap.* 46; but in the principal case, when the now infant Earl was so very young as not to be above a year old, and the testator had appointed him three guardians, it was hardly probable, that the testator himself could imagine, that all those three guardians should live until the child's age of twenty-one; and then to say, that the guardianship shall determine by the death of any one of the guardians, would be to affirm, that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more of them were appointed by the father, the less likelihood there would be that they all should live till the child should arrive to twenty-one.

Lord Commissioner *Gilbert* was of the same opinion with Lord *Jekyll*, observing further, that the Court of Chancery has an original jurisdiction of the right of guardianship, and as formerly the lord by priority, (*i. e.*) that lord of whose manor the lands which were first in the family were held, had a right to the guardianship, so the Court of Chancery could determine touching that priority.

And though tenures in chivalry be taken away, yet the jurisdiction which the King had, as *pater patriæ*, remains.

It appears from *Bracton, lib.* 3. *cap.* 9. and *Fleta, cap.* 2. and *Stamford. fo.* 37. that the King is protector of all his subjects; that in virtue of his high trust, he is more particularly to take care of those who are not able to take care of themselves, consequently of infants, who by reason of their nonage are under incapacities; from hence natural allegiance arises, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince.

[124]

It has been objected, that this is a matter of right, and must be determined by a decree on bill and answer.

But possibly then it will be too late; and when this right depends upon the plain words of a will, why should the infant be delayed, or put to the charge of a decree?

This is an authority coupled with an interest, and no pretence that the guardians are obliged to act jointly. The actions given by the law plainly shew, that the guardian has an interest. The remedies are, 1*st*, trespass if one takes away the ward, and the guardian has got possession of him again, or if the ward is still detained, then a writ of ravishment of ward.

And as to the objection, that the guardian can make no profit of his guardianship, if this be for the service of the family, (as surely it is) why should it not be as valuable, as if the same could have been turned to his own advantage?

The father may bring an action against any person for taking away his heir, and so might any ancestor against any person except against the lord of whom the lands were held in chivalry, before such tenure was wholly taken away.

The case in *Poph.* was only, where the parties having the custody of the infant given to them, were invested with a bare authority for a particular purpose, and so the death of one of the guardians determined this joint authority; whereas the statute of 12 *Car.* 2. (which was drawn by Lord Chief Justice *Hale*) gives the guardian an authority coupled with an interest.

[125]

Such testamentary guardian takes place of all other guardians, and his interest is for the good and honour of the family; as the father was the head of the family, so the statute puts him *in loco patris.*

Wherefore he agreed with Lord *Jekyll in toto,* as did also Lord Commissioner *Raymond.* (1)

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(1) The substance of the cases respecting the several kinds of guardianship, and the origin and extent of the jurisdiction of the Court of Chancery,

CASE 25.

ATTORNEY GENERAL *versus* RUPER.

At the Rolls. 2 Eq. Ca. Ab. 293. pl. 18. One devises 500*l.* to the church of St. Helens, this is good, and belongs to the church-wardens, and to be employed in the repairing and adorning the church.

ONE by will gave 500*l.* to his wife for life, remainder to the parish church of St. *Helens, London,* which is an impropriation; upon this the question was, whether the vicar or stipendiary of this church, should be entitled to this 500*l.* after the testator's widow's death, or whether it should go to the church-wardens for the repairs and improvements of the church?

1. Eq. 4-86.

The Master of the Rolls took time to consider of the case, and afterwards pronounced his decree, that this 500*l.* should not go to the vicar or stipendiary of the church, but did belong to the church-wardens for the reparations of the church, and the improving and adorning the same.

Parson a corporation for the taking of land for the benefit of the church, as the church-wardens are for personal things.

[* 126]

* His Honour took notice, that money or charity given for repairing a church, is one of the charities mentioned, preserved, and established, by the *stat.* 43 *Eliz. c.* 4. that as on the one hand the *parson* of the church is a corporation for the taking of *land* for the use and benefit of the church, and not capable of taking *goods,* or any *personalty* on that behalf; so on the contrary, the *church-wardens* are a corporation to take *money,* or *goods,* or other *personal things* for the use of the church, but are not enabled to take *lands.*

That goods given or bought for the use of the church are all *bona ecclesiæ,* for the taking whereof the church-wardens may bring trespass, *F. N. B.* 91 *K.* and may bring trespass for the taking of these goods, as well in the time of their predecessors, as in their own time.

Wherefore the Court decreed this 500*l.* to be applied towards the repairing and adorning the church.

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in the superintendence of guardians, is to be found in Harg. Co. Litt. 88. *b.* notes 11, 12, 13, 14, 15, 16. Et vide *Powell* v. *Cleaver,* 2 Bro. C. C. 499. (z)

(z) See also *Ex parte Earl of Ilchester,* 7 Ves. 348. *De Manneville* v. *De Manneville,* 10 Ves. 52. *De Bathe* v. *Lord Fingal,* 16 Ves. 167. *Villareal* v. *Mellish,* 2 Swan. 533. *Curtis* v. *Rippon,* 4 Madd. 462. *Wright* v. *Naylor,* 5 Madd. 77.

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TERM. PASCHÆ, 1723.

DRYBUTTER *versus* BARTHOLOMEW.

CASE 26.

At the Rolls.

2 Eq. Ca. Ab. 132. pl. 4.

Husband seised, in right of his wife, of a share of the New River water, the wife cannot be barred sans fine; and where they both without a fine mortgage such share, and the wife after the husband's death pays interest, this will not affirm the mortgage.

BARON in right of the wife seised in fee of a share of the *New River* water, baron and feme make a mortgage by way of lease for 1000 years by deed without fine, reserving a peppercorn rent.

The baron died, upon which the feme received the profits, and paid the interest; and now the mortgagee brought this bill to foreclose the wife, insisting, 1*st*, That this lease being not *actually void*, but only *voidable* by the feme after the baron's death, and the feme having, when discovert, paid the interest, the same amounted to an election in her to affirm the lease.

Or, 2*dly*, That if the mortgage were not affirmed, yet the decree of foreclosure which was desired, would better the legal title of the mortgagee, and not prejudice the feme.

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Master of the Rolls: A fine may be (and usually is) levied of † *New River* shares, by the description of so much land *aquâ coopert'*, and in this case there ought to have been a fine, it being the inheritance of the wife (*z*); if there had been a rent reserved, the acceptance of such rent by the wife, when discovert, would have affirmed the lease (*y*); but here is no acceptance, and the lease is of an incorporeal thing, out of which rent could not well be reserved. (*x*)

† And wherever a fine and recovery are necessary for the cutting off the entail and remainder of such shares, in regard the *New River* runs through three counties, (viz.) *Hertford*, *Middlesex* and *London*, there must be three several fines and recoveries passed as to any of these shares, viz. a fine and recovery in each county. (*w*)

(*z*) See *Buckeridge* v. *Ingram*, 2 Ves. jun. 652.

(*y*) *Doe* v. *Weller*, 7 T. R. 478.

(*x*) Co. Litt. 47 a. But see *Dean and Chapter of Windsor* v. *Gover*, 2 Saunders, 304 a. note 12.

(*w*) *Earl of Stafford* v. *Buckley*, 2 Vez. 182.

DRYBUTTER v. BARTHOLOMEW.

Wherefore the lease expiring by the death of the husband, the mortgage is also thereby determined, and nothing remaining to foreclose. And though the Court will not narrowly look into the title, yet when all this is admitted on both sides, and appears upon the opening, why should I pronounce a vain decree?

Dismiss the bill, but without costs (1).

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(1) In *Goodright* v. *Straphan*, Cowp. 201, there was a mortgage for years by husband and wife, of the wife's inheritance without any fine levied, and on ejectment brought by the wife after the husband's death, against the mortgagee in possession, circumstances of confirmation by the wife when discovert were holden to be a defence in the ejectment, although there was no actual re-delivery of the deed. (z)

(z) S. C. Doug. 53. n. It does not appear that the principal case was noticed in the discussion of *Goodright* v. *Straphan*. See *Clinton* v. *Hooper*, 1 Ves. jun. 177. 3 Bro. C. C. 204.

CASE 27.

JEFFS *versus* WOOD, *& al'. & e contra.*

2 Eq. Ca. Ab. 10. pl. 9. 353. pl. 15. Stoppage no payment at law, nor in equity, unless under special circumstances, and in case of mutual demands, where the balance only is the debt.

ROBERT *Jeffs* the plaintiff's father and testator, having a nephew the defendant *Wood*, received him when an infant, on his father's death, into his (the said *Jeffs*'s) family, and provided him with clothes, and sent him to school; after which he took him apprentice in the trade of a wine cooper, and as to all expenses of clothes, learning, and board, kept an account in his books; but after he became an apprentice, then the board was omitted in the account.

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Then *Jeffs* the father by his will gave 500*l.* to the defendant his nephew, and made his son the plaintiff *Jeffs* his executor and residuary legatee, and died.

1. Rus. Ch. 460.
2. Keen. 323.
4. Tu. Ch. 443.
39. Ch. D. 495.

The plaintiff *Jeffs* the son gave the defendant *Wood* credit for wine, and intrusted him to receive monies; so that the defendant *Wood* became further indebted to the plaintiff.

On the defendant *Wood*'s suing the plaintiff *Jeffs* the executor, in the spiritual court, for this 500*l.* legacy, the plaintiff *Jeffs* brought his bill first against *Wood*, and he becoming a bankrupt, against the assignees under the commission, to have an allowance made him, out of the legacy, for the money which the bankrupt the legatee owed to the testator, and likewise to the plaintiff *Jeffs*; and on the other hand the assignees brought their cross bill against *Jeffs* for the legacy.

Master of the Rolls: It is true, stoppage is no payment at law, nor is it, of itself, a payment in equity, but then a very slender agreement for discounting or allowing the one debt out of the other, will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favoured in law, much less in equity.

But it may be a doubt, whether an insolvent person may in equity recover against his debtor, to whom he at the same time owes a greater sum; though I own, it is against conscience that *A.* should be demanding a debt against *B.* to whom he is indebted in a larger sum, and would avoid paying it.

[130]

However, it seems that the least evidence (*a*) of an agreement for a stoppage will do; and in these cases equity will take hold of a very slight thing to do both parties right. And it is still more reasonable, that where the matter of the mutual demand is concerning the same thing, there the Court should interpose, and make the balance only payable. (*z*)

(*a*) Vide 1 Vern. 122. 2 Vern. 428. Preced. in Chan. 582.

Now in the principal case, the defendant's the legatee's demand is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say, that the defendant the legatee has so much of the assets already in his own hands, and consequently is satisfied *pro tanto;* and forasmuch as it is probable the Spiritual Court will not allow of this discount, therefore the suit here is very proper, in order to have such an allowance.

So that if the legatee himself had brought the bill for his legacy, it had been very proper for the executor to have insisted, that the legatee owing so much to the testator, and having already so much in his hands of the testator's assets, was consequently paid so far.

In the present case, the assignees of the commission of bankruptcy against the defendant *Wood* bring their bill for the

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(*z*) Though now by the statutes 2 G. 2. c. 22. s. 13.; 5 G. 2. c. 30. s. 28; 8 G. 2. c. 24. s. 5. mutual debts may be set off against each other at law, yet the power which courts of equity exercised before the statutes was not taken away by them; and relief may be had in equity under particular circumstances where the nature of the debts will not admit of their being set off against each other at law. *Ex parte Quinten,* 3 Ves. 248. *James* v. *Kynnier,* 5 Ves. 108. *Ex parte Stephens,* 11 Ves. 24. *Ex parte Twogood,* ib. 517. *Ex parte Hanson,* 12 Ves. 346, 18 Ves. 232, 1 Rose, 156. *Bradley* v. *Millar,* 1 Rose, 273. *Addis* v. *Knight,* 2 Mer. 117. *Vulliamy* v. *Noble,* 3 Mer. 593. *Ex parte Ross,* Buck, 125. The stat. 5 G. 2. c. 30. s. 28. above cited, related to set-off in cases of bankruptcy, as to which see now the St. 6 G. 4. c. 16. s. 50.

JEFFS *v.* WOOD.

legacy, and standing in the place of the legatee, can be in no better case; and therefore, as the legatee, had he brought his bill for the legacy, might have been told by the executor, that having so much of the assets in his hands, he was consequently paid so much of his legacy, surely the same thing may now be insisted upon against the assignees, who stand in the place of, and represent the legatee.

[131] Then it was objected, that this demand of the defendant *Wood*, or of the assignees, was not a *debt* but a *legacy*, and a matter demandable in the spiritual court where it was sued for, till such suit was stopped by injunction; and that the statutes of bankrupts mention only *debts* due from and to the bankrupt.

But to this it was answered and resolved, that a legacy due from an executor who admits assets, (as in the present case) is in equity a debt due from such executor, and an equitable demand is a debt within the statutes of bankrupts.

3*dly*, As to the money or goods lent or delivered to the defendant *Wood* by the plaintiff the executor, this was held by the Court to be in part of payment, and that it must necessarily be so taken; otherwise the plaintiff would have credited the defendant *Wood* therewith; and by the same reason that if the legatee had sued in equity, the executor might have said and insisted, that the plaintiff had received so much of the legacy by money and goods, and that the defendant was ready to pay the rest, so the assignees claiming the legacy could not be in a better condition than the legatee himself.

4*thly*, The court took notice, that it was not material that the defendant was an infant when the clothes and education were provided for him by his uncle; for an infant may become indebted for these as well as a person of full age for money lent; and the testator's having kept an account, as between debtor and creditor, of all these charges, fully shewed they were not intended as gifts but loans.

[132] 5*thly*, That there could be no pretence to say, because the testator gave a legacy of 500*l.* to the defendant *Wood*, therefore this was an argument or evidence, that the testator intended to remit the former debt; but if a man gives a legacy to his creditor to the amount of his debt, this has been construed a payment or (†) satisfaction of the debt, because a man must be supposed to be just before he is bountiful.

† Notwithstanding this general doctrine, yet where the testator has left wherewithal, and shewed his intentions so to be, he has been construed to be

Decree an account, and let the plaintiff pay only the surplus, after having deducted what is due from the legatee, as well to himself as to the testator, but no costs on either side. (z)

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both just and bountiful. Vide Salk. 155. *Cuthbert* v. *Peacock*, and vol. 1. *Chauncy's* case, 408.

(z) *Ranking* v. *Barnard*, 5 Madd. 32.

CARTERET *versus* CARTERET. (1)

CASE 28.

LORD MACCLESFIELD.' Devise of land to trustees, in trust if the eldest son of *A.* turn protestant, then to such eldest son; this a good devise not to a papist, but to a protestant.

LADY *Carteret*, being seised in fee of some lands in *Middlesex*, part of which were freehold, and part copyhold, and having surrendered the copyhold to the use of her will, devised all her said freehold and copyhold lands to trustees and their heirs, to the use of the eldest son of Sir *Charles Carteret* for two years next after her death, and if the said eldest son within these two years should become a protestant, then the trustees were to stand seised to the use of such eldest son in tail male, and for want of such conformity, then to the use of the second, and every other son of the said Sir *Charles Carteret* being a protestant, and to the heirs male of their bodies being protestants; and for want of such conformity in any of the sons, or if they should die without issue male, then to the use of the eldest daughter of Sir *Charles Carteret*, being a protestant, and the heirs of her body being protestants, remainder to the second, &c. daughter of Sir *Charles Carteret*, being a protestant in tail, remainder to the eldest son of Sir *Christopher Hale*, who was afterwards Sir *Edward Hale*, and actually a protestant and born of protestant parents.

[133]

Sir *Charles Carteret* had several sons that were all papists, and continued so, but his eldest daughter being above the age of eighteen years and six months did conform, and now brought her bill against the trustees, to compel them to join with her in suffering a common recovery of the premises.

1*st. Obj.* The eldest daughter being above the age of eighteen and six months, her conformity afterwards is of no avail, she being disabled by the statute from taking.

Cur': No estate or right is to vest in any of the sons or daughters of Sir *Charles Carteret* until they conform, and be-

(1) Reg. Lib. A. 1722, fol. 236.

CARTERET *v.* CARTERET.

come protestants; their conversion to the protestant religion is a condition precedent to their taking the estate, and the act of the 11 & 12 *W.* 3. against papists, does not affect this case; for this devise is not to a papist, but on the contrary is exclusive of papists; and therefore if this eldest daughter of Sir *Charles Carteret* be a sincere convert to the protestant religion, she is entitled to take; but in regard there may be some doubt of the sincerity of her conversion, let it stand over.

Cestui que trust in tail brings a bill against the trustees, to the intent they should join in a recovery, this not proper; but it is proper to pray, that the trustees may convey the premises to cestui que trust in tail, who may then suffer a recovery; though if the trustees are also trustees for any annuity subsisting, they are not compellable to part with the legal estate out of them to the cestui que trust in tail.

* 2*d Obj.* The plaintiff's bill being to compel the trustees to convey the legal estate, in order to have a common recovery suffered thereof, this is an idle prayer; because the devise, being to the use of the first, &c. son of Sir *Charles Carteret*, and so to the eldest daughter of Sir *Charles* successively in tail, is an use executed; for a devise (1) to an use is as much an use executed, as any other conveyance to an use.

[*134] *Cur':* If this be a doubt, it is reasonable that the trustees should be decreed to convey; and if they have no legal estate, it will not hurt them.

3*d Obj.* Supposing the trustees have the legal estate, yet the bill prays, that they should join in a common recovery, which is, in effect, by compelling the trustees to join in destroying all the remainders created by the will, to make them join in disappointing the will.

Cur': So far the bill seems proper, that as the plaintiff has a right to the estate-tail in the trust, so the trustees should convey to the plaintiff an estate-tail in the lands, and after the plaintiff has gained this estate-tail, none can prevent her from having a power to suffer a recovery of this estate, it being incident to tenant in tail to suffer a recovery; but the devise being to trustees to pay several annuities out of the estate to several of the brothers and sisters, if any of these annuities are still subsisting, I do not think that, without the consent of the annuitants, the legal estate can be forced out of the trustees,

[135] they being trustees as well for the annuitants with regard to their annuities, as for the plaintiff in respect to the residue of the profits of the land.

But it being said, that the brothers and sisters of the plaintiff, to whom these annuities are given, are papists, let the

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(1) Vide Harg. Co. Litt. 271. a. part of the note to 271. b.

master inquire what age they were of at the time of the death of the testatrix, and when these annuities were to vest: if they shall appear to have been above the age of eighteen years and six months, then the devise to them is void; but (*a*) if they were so very young, as not to be above the age of one, two, three or four years, and consequently incapable of professing the popish religion, in such case, they shall retain these annuities until their age of eighteen years and six months, from which time the annuities are to go to protestant kindred, until the death or conformity of the annuitants; but if the infants were thirteen or fourteen at the time of the vesting of these annuities, it is my opinion, that then they might be looked upon as capable of professing the popish religion; and if in fact they did profess the same, they were thereby incapable of taking, and the devise to them of their annuities was void.

CARTERET *v.* CARTERET.

(*a*) See the case of Hill and Filkin, ante. 6. An infant under the age of eighteen, professing the popish religion, cannot take a real estate; secus if so young as not to be able to choose or understand any religion.

Also the Court said, that such brothers or sisters could not release their right to any entail given them by the will; forasmuch as without a fine they could not bar their issue.

6. Sim. 180.

HARRIS *versus* BISHOP OF LINCOLN.

CASE 29.

Lord MACCLESFIELD.

One seised in fee as heir of the mother's mother, devises the land to trustees in fee, in trust to pay several annuities, and the residue to go to the testator's right heirs of his mother's side for ever; the heirs of the mother's mother's side entitled to the estate and surplus of the profits after the annuities paid.

TALBOT *Barker* being seised in fee of a real estate as heir on the part of his mother's mother, and being also seised in fee of a very small estate of * 4*l.* per annum, as heir to his own father, devises all these lands to trustees and their heirs, in trust to pay several annuities and charities; after payment of which, he devises the residue of the rents and profits of the premises to his own right heirs of his mother's side for ever; and the question was, who should be entitled to the residue of the rents and profits, whether the heir of the mother's father, or the heir of the mother's mother?

1*st*, It was insisted, that parol proof should be read as explanatory of the testator's intention. [* 136]

To which it was answered, that though parol proof might be in some cases allowed as to personal estate, as was done in the case of *Fane* versus *Fane* (*a*), yet in the case of land, where the statute requires that the will should be in writing, there ought not to be any parol proof; and therefore in the case of *Strode* versus *Lady Russel & al'* (*b*) where the devise was of

(*a*) 1 Vern. 30.

(*b*) 2 Vern. 621. Reports in Chan. part 3, fol. 90, folio edition.

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lands out of settlement, the House of Peers would not allow any parol proof, for that the title of the devisee must depend upon the words of the will, otherwise no counsel that should see the will, would be able to give advice thereon.

Parol evidence admitted to prove which heir was intended, (viz.) whether the heir of the mother's mother's side, or the heir of the mother's father's side.

But Lord Chancellor said, that the reason of this was, because the settlement should be produced; without the producing of which, the lands were to be presumed free from any settlement; and though *Fane*'s case was only of a personal estate, yet the same being above the value of what one might by parol dispose of (for it was a great personal estate) it seemed within the reason of a devise of land.

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However, that in this case parol evidence of what the testator said, or directed, when he ordered the will to be made, might be admitted, as where one having two sons, (*a*) both named *John*, devised land to his son *John*, there parol proof was admitted to shew which son *John* the testator meant, and yet *additio probat minoritatem;* so if there were two persons both named *J. S.* of *Dale*, and I should devise my land to *J. S.* of *Dale*, parol evidence would be admitted, in such case, to prove which *J. S.* of *Dale* was intended by me; and for the same reason, in the principal case, there being two heirs of the mother's side, (viz.) one who was heir of the mother's father, and the other heir of the mother's mother, the Court might well admit parol evidence (1) to shew which heir of the mother's side was intended.

(*a*) 5 Co. 68.

Upon which two witnesses were read, proving, that at the time of making the will, the testator declared the heir of his mother's mother should have his estate, because it came from thence.

Then it was objected, that if the will should be construed in such manner as to entitle the heir of the mother's mother to the estate, such will would be void and nugatory, and the testator, all this while, would be doing of nothing, because, without any will the premises would go to the heir of the mother's mother, who was the heir at law to this estate, the heir of the mother's father having none of the blood of the first purchaser. (*b*)

(*b*) 1 Inst. 12.

To which the Court said, that the testator giving by his will several annuities and charities, and then saying, that the residue of the profits should go to the right heirs of the mother's

(1) For cases in which parol evidence has been admitted upon the construction of written instruments, vide *Rachfield* v. *Careless*, post 158.

side, it was the same thing as if he had said, "So far I dis- "pose of my estate, and let so much of it go from my heir, "who otherwise would have had it; but I will not dispose of [138] "it any further from the heirs at law of the mother's side "whence it came, and where it would go, in case I should not "give it away."

Also there might be reason to use these words, and they are not nugatory, because otherwise the trustees might be entitled; it is true, if I devise lands to trustees to pay debts, or devise a term for years to pay debts, here being a devise for a particular purpose, when such purpose is answered, the devisee shall be but a trustee for the heir at law, and the term shall be attendant on the heir at law who has the inheritance; but the present case differs, as the devise (1) is only of annuities and charities, without any particular words expressing the devisees to be trustees only; so that the devisees, had it not been for these latter words, might themselves, and in their own right, have been entitled to the premises.

Obj. The express devise, gift or declaration, that the premises should go to the heirs of the mother's side, is a special declaration of an use, and like the case in *Hobart* 31. where a man seised of land as heir of the mother's side, makes a feoffment without a consideration, and declares expressly the use to be to himself and his heirs; and there it is said, that the express declaration of the use carries it to the heirs of the father's side; whereas had the feoffor been silent, and left the use to result by implication, it had been the old use, and would have gone to the heir of the mother's side.

One seised in fee as heir of mother's side, levies a fine, and declares the use thereof to himself in fee; this is the old use, and no diversity betwixt an express declaration of an use, and one implied.

* But Lord Chancellor denied this case in *Hob.* to be law; saying, that the contrary had been determined in 3 *Lev.* 406. *Godbolt* versus *Freestone*, and in *Salk.* 591. *Abbot* versus *Burton*, in both which cases it was solemnly adjudged, that the use whether expressly declared by the feoffor, or permitted to arise by implication, was the same thing, and would go to the mother's side. (2)

But (as his Lordship observed) here was very little to be said [* 139] for the heir of the mother's father, who in this case was neither the heir general (for the heir general must be heir of the

(1) The lands were devised to trustees, expressly in trust, to pay some particular annuities, but the remainder of the annuities and the charities were merely charged on the lands.

(2) Harg. Co. Litt. 12. b. note (2).

HARRIS *v.* Bishop of LINCOLN.

father's side, and not of the mother's father) nor the heir *quoad hoc*, (viz.) as to these lands; for the heir as to these lands was the heir of the mother's mother, from whom they descended; so that the heir of the mother's father was neither heir *simplicitèr*, nor *quoad hoc*, to the party that last died seised, (viz.) to this *Talbot Barker*.

From all which it seemed to be a clear case, without laying any great stress upon parol proofs; and though, it being a matter of law, his Lordship said, he would not deny sending it to the Judges, if insisted upon, yet he himself had no doubt about it.

But it being insisted upon, that this was a bare trust, and therefore not properly determinable by the Judges, with regard to the question, in whom the legal estate was vested? the Court took upon themselves to determine it, and decreed in favour of the heir of the mother's mother's side, from whom the estate came.

[140] In the last place, it was made a question to whom the land of the value of 4*l.* per annum, which came by the father's side, should go?

With regard to which it was said, that the will directing that the residue of the rents and profits should go to the right heir of the testator's mother's side, it was thereby intended they should all go together and not to different persons; that the same words could not operate several ways, and entitle different persons to different parts of the estate.

Yet Lord Chancellor was of opinion, that the same words might be taken (*a*) distributively; (viz.) that the lands which came by the mother's mother, should return to the heirs of the mother's mother; and on the other hand, that the lands which descended from the father, should return to the heirs of the father in the same manner, as if there had been no disposition made thereof, and they had been left to descend; at least so far was clear, that this small estate of 4*l.* per annum, which came to the testator as heir to his father, must contribute in proportion to the charities and annuities.

(*a*) See the case of Forth versus Chapman, vol. 1. 667.

But this last mentioned estate being of so small value, the counsel did not insist upon having the opinion of the Court about it, nor was the heir general of the testator a party to the suit.

BEAUMONT *versus* FELL.

CASE 30.

At the Rolls. 2 Eq. Ca. Ab. 366. pl. 8. Legatee's both christian and surnames mistaken, yet the legacy is good.

ONE by will devised a legacy of 500*l.* to *Catharine Earnley;* the person's name who claimed this legacy was *Gertrude Yardley;* and it was insisted by her, and admitted that no person named *Catharine Earnley* claimed this legacy; but by the proof it appeared, that the testator's voice, when he made his will, was very low and hardly intelligible; that the testator usually called the legatee of this 500*l.* *Gatty,* which the scrivener, who took instructions for drawing the will, might easily mistake for *Katy,* and that the said scrivener not well understanding who this legatee of the 500*l.* was, or what was her name, the testator directed him to *J. S.* and his wife to inform him further, who afterwards declared that *Gertrude Yardley* was the person intended.

6. Sim. 57.
11. — 472.

It was moreover proved, that the testator in his life-time had declared, that he would do well for her by his will.

Obj. The statute of frauds requires, that a will of a personal estate above such a value should be in writing; and a will in writing giving a legacy to *Catharine Earnley,* cannot be a writing to entitle *Gertrude Yardley* to this legacy, for that both the christian and surname are entirely different; and by the same reason it may be maintained, that a legacy given to *A. B.* is a good legacy to *C. D.*

Upon this case the Master of the Rolls took time to consider and give his resolution, at the first hearing inclining that the legacy was void.

But afterwards, at another day, his Honour gave his opinion, [142] that the legacy was a good legacy to *Gertrude Yardley,* though the same was given by the will to *Catharine Earnley.*

It is true, if this had been a grant, nay, had it been a devise of land, it had been void, by reason of the mistake both of the christian and surname. (*z*)

In 1 *Inst.* 3. *a.* it appears, that special care ought to be taken of the name of baptism, because (as it is said there) a man cannot have two names of baptism; though in the same place it is allowed, that in some cases the mistake of a christian name may be helped; as if a grant or devise be to *William* Earl of *Pembroke,* or *William* Bishop of *Salisbury,* and

(*z*) But see *Hampshire* v. *Peirce,* 2 Vez. 216. and in *Thomas* v. *Thomas,* 6 T. R. 671, evidence was received to shew that both names of the devisee of real estate had been mistaken.

BEAUMONT v. FELL.

his name be *John*, it is in such case good, there being a sufficient certainty without the christian name, for that there can be but one person Earl of *Pembroke* or Bishop of *Salisbury*; wherefore the mistaken christian name shall be rejected as surplusage.

And in the principal case 'tis alleged to be much worse, neither the christian or surname being right, nor any addition of certainty to help it, and by the common law, as well as by the statute, the devise of land ought to be in writing; and there would have been no writing to entitle *Gertrude Yardley*, had this been a devise of land.

However, this being a bequest of a personal thing, a chattel interest, makes it a different case, and as, originally, a bequest of a legacy was governed by and construed according to the rules of the civil or canon law, so shall it be after making the statute of frauds, provided there be a will in writing.

[143] Now here is a will in writing, and the claim in the present case is founded upon it; in *Swinburn*, 389, it appears, that where a man intends to give a legacy to *J. S.* and he gives the same to *J. N.* there neither *J. S.* or *J. N.* shall take the legacy, forasmuch as *J. N.* is not the person intended, and *J. S.* is not the person named; but (says the book) if the testator does err in the name, and not in the person, such error shall not hurt.

Now, in the principal case the name, and not the person is mistaken; and it is very material, that here is no such person as *Catharine Earnley* claiming this legacy, which, together with the proofs of the testator's having a very low voice, when he made the will, and of his having usually called the plaintiff *Gatty* instead of *Gertrude*, and often declared he would do well for her, is sufficient to entitle the plaintiff to this legacy. (1)

(1) So, *Goodinge* v. *Goodinge*, 1 Vez. 231. *Dowset* v. *Sweet*, Amb. 175. (*z*)

(*z*) *Masters* v. *Masters*, ante, 1 vol. 421. *Bradwin* v. *Harpur*, Ambler, 374. *Andrews* v. *Dobson*, 1 Cox, 425. *Parsons* v. *Parsons*, 1 Ves. jun. 266. *Thomas* v. *Thomas*, 6 T. R. 671. *Walpole* v. *Cholmondeley*, 7 T. R. 148. *Campbell* v. *French*, 3 Ves. 321. *Price* v. *Page*, 4 Ves. 680. *Smith* v. *Coney*, 6 Ves. 42. *Doe* v. *Danvers*, 7 East, 303. *Careless* v. *Careless*, 1 Mer. 384. *Doe* v. *Oxenden*, 3 Taunt. 147, 4 Dow, 65. *Doe* v. *Huthwaite*, 8 Taunt. 306. 3 B. & A. 632. *Eade* v. *Eade*, 5 Madd. 118.

DE

TERM. S. TRINITATIS, 1723.

NORTON *versus* TURVILL.

CASE 31.

At the Rolls.

2 Eq. Ca. Ab. 152. pl. 14. Feme covert having a separate estate, borrows money and gives a bond; the separate estate liable; and though six years pass, the demand not barred by the statute of limitations.

A FEME covert before her marriage, with the consent of her then intended husband, conveyed an estate to her separate use, and after her marriage she borrowed 25*l.* upon her bond; ten years afterwards she made her will, thereby giving several specific legacies, and made *A.* and *B.* executors; on her death her husband possessed himself of monies which she left, to the amount of 24*l.* after which the obligee in the bond brought a bill against the executors and the husband; and one of the executors confessed assets; but the husband insisted upon the statute of limitations.

1*st*, Objected for the husband, that the bond given by his wife is void, and not like a bond given by an infant, which is voidable only; but a feme covert may plead *non est factum*, the bond as to her being merely void; and if so, then the matter rests only upon the loan of this money to the feme covert, which demand is barred by the statute of limitations; and though the statute be not pleaded, but only insisted upon by the answer, yet the same advantage ought to be made thereof, as if pleaded.

3. Tu. & Ca. 213.
17. Q. B. D. 534.
35. Ch. D. 94.
39. —— 489.

[145]

2*dly*, It was insisted, that one of the executors having in this case confessed assets, the plaintiff, at least in the first place, ought to proceed against him.

Master of the Rolls: It is true, that the bond given by the feme covert is merely void, and in that respect differs from a bond given by an infant, which is only voidable.

It is likewise true, that the defendant insisting upon the benefit of the statute of limitations by way of answer, shall, at the hearing, have the like benefit of the statute, as if he had pleaded it.

But in this case, all the separate estate of the feme covert

NORTON *v.* TURVILL.[a]

(*a*) Post 373. Blakeway versus Earl of Strafford.

was a trust-estate for payment of debts, (*z*) and a trust (*a*) is not within the statute of limitations. (1)

From whence it seems as if the plaintiff ought to be at liberty to prosecute all the defendants, in order to be paid out of the separate (2) estate left by the feme covert, to which purpose such part of the separate estate, as is undisposed of by the will, ought to be first applied; in the next place, if that be not sufficient, the creditors are to be paid out of any money legacies given by the feme covert, and lastly, supposing there is still a deficiency, all the specific legatees ought to contribute in proportion.

Several executors, and some admit assets, yet an account decreed against the rest.

[*146]

Neither can it be material, so as to excuse the other defendants, that one of the executors of the feme covert has admitted assets; for he might admit assets, and yet have none, nor any estate * of his own. And it would not be reasonable, that this should prevent the plaintiff the creditor from prosecuting the other executor, or the husband, who may have possessed themselves of part of the separate estate, and ought to be responsible. (3)

For which reasons, let all the executors account for what they respectively have in their hands of the feme covert's personal estate, or the produce thereof, and let the same be liable in the order aforesaid, reserving costs. (4)

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(1) That is, as between trustees and *cestui que trust*. *Llewellyn* v. *Mackworth*, 2 Eq. Ca. Ab. 579. pl. 8. *Townshend* v. *Townshend*, 1 Bro. C. C. 554. (*y*)

(2) Vide *Allen* v. *Papworth*, 1 Vez. 163. *Grigby* v. *Cox*, 1 Vez. 517. *Peacock* v. *Monk*, 2 Vez. 193. *Biscoe* v. *Kennedy*, 1 Bro. C. C. 17. (note.) *Hulme* v. *Tenant*, 1 Bro. C. C. 16. *Pybus* v. *Smith*, 3 Bro. C. C. 340. (*x*)

(3) So, *Wall* v. *Bushby*, 1 Bro. C. C. 488 (*w*)

(4) Reg. Lib. B. 1722, fol. 297.

(*z*) The bond was an acknowledgment of the debt, *Lillia* v. *Airey*, 1 Ves. jun. 277. and an appointment of the separate estate. *Sockett* v. *Wray*, 4 Bro. C. C. 487. *Heatley* v. *Thomas*, 15 Ves. 603. *Greatley* v. *Noble*, 3 Madd. 94. *Stuart* v. *Kirkwall*, ib. 389. But a bond is not entitled to priority in the administration of the separate estate of a deceased feme covert. *Anon.* 18 Ves. 258.

(*y*) *Cholmondeley* v. *Clinton*, 2 Mer. 357. and 2 Jac. & W. 138, 190, where all the cases upon this point are discussed.

(*x*) See further, as to the separate estate of a feme covert, the note to *Powell* v. *Hankey*, ante, 85.

(*w*) *Price* v. *Vaughan*, 2 Anst. 524.

LADY WHETSTONE *versus* Sts. BURY.

Case 32.

At the Rolls. Preced. in Chan. 591. On a marriage-settlement lands were conveyed to trustees and their heirs, to the use of the trustees and their heirs, to the use of the husband for life, remainder to the use of the wife for life, remainder to the first, &c. son of the marriage. These limitations to the husband for life, &c. are trusts only, and not uses, and when the husband and wife levied a fine to a mortgagee to raise money, though the fine would have been a forfeiture of the wife's estate for her life, had she had the legal estate, against which equity would not relieve; yet decreed, that a trust estate was not forfeited by a fine.

There was a settlement before marriage, by lease and release to trustees and their heirs, to the use of them and their heirs, to the use of the husband for life, remainder to the use of trustees and their heirs, during the life of the husband, to preserve contingent remainders, remainder to the use of the wife for life, remainder to the use of the first, &c. son of the marriage in tail male.

There was issue a son by the marriage.

The husband concealed the settlement, and together with his wife, by deed and fine *come ceo, &c.* mortgaged the premises in fee to the plaintiff, the son being at that time an infant.

[147]

On the husband's death, the mortgagee brought a bill against the wife and the son (who was then come of age) praying, that the premises mortgaged might be sold, and the plaintiff the mortgagee relieved against the forfeiture created by the fine, in which the wife joined, and thereby (as was alleged) had forfeited her estate for life.

The son pleaded the settlement, by which he was a purchaser of the remainder in tail, in consideration of his mother's marriage and portion, and insisted, that by the fine without his concurrence his mother had forfeited her estate for life; and this being a forfeiture at law, equity ought not to relieve.

The plea was argued and allowed, and on motion to dissolve the injunction, Lord Chancellor said, that his opinion must be well enough known in this case, his Lordship having refused relief, even in the case where a copyholder (*a*) made a lease of his copyhold beyond what the custom would allow, and the Lord had entered for a forfeiture.

(*a*) See the case of Sir H. Peachy versus Duke of Somerset. Preced. in Chan. 568. (*z*)

But the cause coming on to be heard before the Master of the Rolls, his Honour observed, that the use and legal estate

(*z*) S. C. Strange, 447.

Lady WHETSTONE *v.* Sts. BURY.

were vested in the trustees, and the limitations to the husband, wife and sons, were but trusts, and a trust for life was not (1) forfeited by a fine; wherefore this plea was false, not being warranted by the settlement.

However, notwithstanding it was proved, that the son, after he came of age, had said, he would see the mortgage paid, for
[148] that the money had been advanced for the benefit of the family: in regard there was no evidence in writing of this, and it appeared to have been said voluntarily, but especially, forasmuch as the defendant the son was an infant at the time when this money was lent, all the Court would do, was, to decree that the plaintiff the mortgagee should hold and enjoy the mortgaged premises, during the life of the wife. (2)

(1) So, *Lethieullier* v. *Tracy*, 3 Atk. 728, 730. (*y*)

(2) Reg. Lib. B. 1722, fo. 538. "Order for an injunction to quiet the "plaintiff in possession of the premises "during life of the defendant *Elizabeth* "only."

(*y*) *Penhay* v. *Hurrell*, cited, ante, vol. 1. 56. and 1 Vez. 27. *Chapman* v. *Blissett*, Ca. temp. Talb. 145.

CASE 33.

EWER *versus* CORBET.

At the Rolls. 2 Eq. Ca. Ab. 449. pl. 2. One possessed of a term devises it to *A.* and makes *B.* his executor, and leaves some debts. If the executor sells the term, the purchaser shall hold it against the devisee. Secus if sold at an under value, or if the purchaser knew there were no debts, or that the debts were or could be paid, without breaking in upon this specific legacy.

ONE possessed of a term for years, devised it to *A.* and died indebted, having made *B.* his executor.

1 Ch. Rep. 340.
1 Keen. 541.
1713. 2 Ch. [illegible]

The executor sold the term, upon which the devisee of the term brought a bill against the purchaser, insisting, that the term being devised to the plaintiff, the executor was but a trustee for him, and that the purchaser must have notice of this trust, the term having been bought of the executor, and consequently must be taken subject to the trust.

Master of the Rolls: I remember it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of Major (*a*) *Bill* versus *Humble*.

(*a*) 2 Vern. 444. where it appears that the mortgage made of a term by an executor, was by this Court held to be good, and that a residuary or specific legatee had only their remedy against the executor. But that decree, was on appeal, reversed by the House of Lords. (1)

(1) 1 Bro. P. C. 71.

But since that, I take it to have been resolved, and with great reason, that an executor, where there are debts, may sell a term, and the devisee of the term has no other remedy, but against the executor, to recover the value thereof, if there be sufficient assets for the payment of debts.

As for the notice of the will, and of the devise of the term to a third person, that is nothing; for every person buying of an executor, where he is named executor, must, of necessity, have notice, so that if notice were to be an hinderance, then, of consequence, no executor might sell.

It is not reasonable to put every purchaser of a lease from an executor, to take an account of the testator's debts; nor has he any means to discover them.

On the contrary, as the whole personal estate of the testator is liable to the debts, this lease must (*inter alia*) of necessity be liable, and therefore may be sold by the executor.

If equity were otherwise, it would be a great hinderance to the payment of debts and legacies; and would lay an *embargo* upon all personal estates in the hands of executors and administrators; which would be attended with great inconveniences.

I admit, if an executor should sell a term for an under value, or to one who has notice that there are no debts, or that all the debts are paid, this might be another consideration: but there being no such ingredient in the present case,

Dismiss the bill. *See the following case.* (1)

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(1) So, *Nugent* v. *Giffard*, 1 Atk. 463. *Elliot* v. *Merriman*, Barnard, 78. and 2 Atk. 41. S. C.—So, although the term be sold in satisfaction of the private debt of the executor. *Nugent* v. *Giffard*, 1 Atk. 463. *Mead* v. *Lord Orrery*, 3 Atk. 235. *Ithell* v. *Beane*, 1 Vez. 215. unless the purchaser appear to collude with the executor, as in *Crane* v. *Drake*, 2 Vern. 616. This point also came in question in *Scott* v. *Tyler*, 2 Bro. C. C. 431. (*z*)

(*z*) S. C. Dick. 724. See also *Bonney* v. *Ridgard*, 1 Cox, 145. *Andrew* v. *Wrigley*, 4 Bro. C. C. 125. *Dickenson* v. *Lockyer*, 4 Ves. 36. *Bedford* v. *Woodham*, ib. 40, n. *Hill* v. *Simpson*, 7 Ves. 152. *Taylor* v. *Hawkins*, 8 Ves. 209. *M'Leod* v. *Drummond*, 14 Ves. 353, 17 Ves. 152. *Drohan* v. *Drohan*, 1 Ba. & Be. 185. *Ray* v. *Ray*, Coop. 264. *Keane* v. *Robarts*, 4 Madd. 332. The same principles apply to sales, &c. by trustees of real estates. *Watkins* v. *Cheek*, 2 S. & S. 199.

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CASE 34.

BURTING *versus* STONARD.

At the Rolls. Vide supra.

A FREEMAN of *London* possessed of several leasehold houses, among other personal estate, by will made in 1699, devised one third of all his personal estate to his wife, another third to his child, and his own testamentary third to his wife for life, remainder to such of his children as should be living at his wife's death, and having left his wife executrix, appointed *J. S.* overseer of the will, giving him 10*l.* for his care in seeing the will performed.

Soon after the testator died, and his wife sold all the leasehold houses to *J. S.* the overseer of the will.

In 1709, the wife died, upon which the plaintiff, who was the only child living at the death of her mother, brought her bill to have the benefit of the term.

And for the plaintiff it was insisted, that this differed from the former case, in regard the purchaser here was the overseer of the will, and had a legacy given him for his care in seeing the will performed; that he had inventoried and appraised the estate, by which he must have been sensible, that the debts were much less than the personal estate came to, and consequently it was a breach of trust in the purchaser.

That if the purchaser of a lease knows the debts to be all paid, or that they can be all paid, without the sale of these specific legacies, he ought not to take advantage of such a purchase; and as to the length of time, that was taken off, by the widow's living to 1709.

[151] Upon which the Master of the Rolls took the inventory in his hand, and casting up the particulars, found thereby, that the debts could not be paid without the sale of part of the leasehold houses, and therefore dismissed the bill.

But the Court said, this case was not so strong as the last preceding case, because here nothing specific, nor any particular lease was devised to the children, as in the former case, but only a third part of his personal estate in general.

CASE 35.

UVEDALE *versus* HALFPENNY.

At the Rolls. 2 Eq. Ca. Ab. 718. pl. 4. In a marriage-settlement, a term for years for securing younger children's portions is by mistake, made subsequent to the estate-tail limited to the sons; this helped in equity.

IN a settlement the lands were limited to the husband for life, remainder, as to part, to the wife for life, remainder of the

whole, to the first, &c. son in tail male, remainder to trustees for 500 years, to raise portions for younger sons and daughters of the marriage; and the trust of the term was declared to be, to secure maintenances for the younger sons and daughters from the husband's death, and to pay the portions of the younger sons at twenty-one, and of the daughters at twenty-one or marriage, which should first happen.

There was also a covenant to surrender copyhold lands to trustees, in trust by rents, issues and profits, to raise the said portions for the younger sons and daughters of the marriage, at such times and ages as aforesaid, and as an additional security for the same.

A bill was brought to rectify the mistake in the settlement, in placing the term after the limitation in tail to the sons; whereas the term should have come in before such limitation in tail. [152]

The husband was dead leaving several daughters, one of whom was married to the plaintiff *Uvedale;* and the eldest son as to such part of the premises of which he was tenant in tail in possession, had suffered a common recovery.

Objected for the defendant: what is asked by the bill is, that the Court should make a new and different settlement, which it is not in the power of the Court to do, especially, in this case, where there is a competent provision for the daughters and younger children out of the copyhold estate; and if the term should take place before the limitation to the sons, it would greatly distress the eldest son and heir.

Master of the Rolls: I would not destroy the settlement, but set it right, according to the intention and agreement of the parties; and by the declaration of the trust of the term, the intention and agreement of the parties manifestly appears to be, that the land should be charged with the payment of portions for the younger sons and daughters at certain ages, (viz.) for the sons at twenty-one, and for the daughters at twenty-one or marriage, and maintenance to begin from the death of the husband; and this appearing, I do not regard the placing of the term, but will help the mistake, which would otherwise prevent the agreement of the parties from taking effect; and this I am the rather induced to do, as it is in the case of a settlement made pursuant to articles before marriage, so that the younger children and daughters are as much purchasers of their portions as the eldest son of his estate-tail limited to him by the settlement. (1)

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(1) So, *Kentish* v. *Newman,* ante, 1. 194. and these cases are the same in principle with *Trevor* v. *Trevor,* ante, vol. 234. *Targus* v. *Puget.* 2 Vez.

UVEDALE *v.* HALFPENNY.

Besides, younger children, as to their provisions, though by a will, are looked upon in nature of creditors; and the agreement being to charge the land with portions payable at certain and usual times, with maintenance from the husband's death, until the portions should become payable; it is very plain, that equity will charge the land according to the intention and agreement of the parties, and will effectuate the same; nor is it reasonable to say, that the provision by the copyhold shall be all that the younger children are to have, when by the express words of the settlement, the surrender of the copyhold is intended but as an additional security, and to come in aid only of the freehold estate.

It is a further demonstration that the limitation in tail to the first, &c. son, previous to the term for making provisions for younger sons, &c. is a mistake, because the remainder in tail to the younger sons must be spent before the portions for these very younger sons can take place.

And in regard the wife, who is the mother of these younger children, consents to the raising of the portions, let her (if she agrees thereto) make a conditional surrender of her estate for life, to be void on non-payment of 40,000*l.* in six months; and

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1 vol. 622. *West* v. *Errissey*, post. 349, &c.—(*z*) On the general head of relief against mistakes in deeds, &c. vide *Simpson* v. *Vaughan*, 2 Atk. 31. *Henkle* v. *Royal Exchange Assurance Company*, 1 Vez. 318. *Baker* v. *Paine*, 1 Vez. 456. *Harwood* v. *Wallis*, (cited) 2 Vez. 195. *South-Sea Company* v. *D'Oliff*, (cited) 2 Vez. 376. *Eden* v. *Earl of Bute*, 7 Bro. P. C. 204. 445. *Countess of Shelburne* v. *Earl of Inchiquin*, 1 Bro. C. C. 338. (*y*)

(*z*) See also on the Head of Relief against Mistakes in Marriage Settlements, where the existence of the mistake is ascertained from articles, or some other previous instrument, pursuant whereto the settlement is, or ought to have been made, *Langley* v. *Furlong*, 1 Dick. 315. *Randall* v. *Willis*, 5 Ves. 262. *Barstow* v. *Kilvington*, 5 Ves. 593. *Jenkins* v. *Quinchant*, ib. in note. *Burrell* v. *Crutchley*, 15 Ves. 544.; where the existence of the mistake is collected from the frame of the settlement itself, *E. of Northumberland* v. *E. of Egremont*, 1 Eden, 435. *Doran* v. *Ross*, 3 Bro. C. C. 27. 1 Ves. jun. 57. *Payne* v. *Collier*, 1 Ves. jun. 170. *Hope* v. *Lord Clifden*, 6 Ves. 499. *Hume* v. *Rundell*, 2 S. & S. 174.

(*y*) *Jalabert* v. *D. of Chandos*, 1 Eden, 372. *Ex parte Symonds*, 1 Cox, 200. *Burt* v. *Barlow*, 3 Bro. C. C. 451. *Mosely* v. *Virgin*, 3 Ves. 184. *Thomas* v. *Frazer*, ib. 399. *Burn* v. *Burn*, ib. 573. *Stangroom* v. *Marq. Townshend*, 6 Ves. 328. *Woollam* v. *Hearn*, 7 Ves. 211. *Gray* v. *Chiswell*, 9 Ves. 118. *Clinan* v. *Cooke*, 1 Sch. & L. 22. *Underhill* v. *Horwood*, 10 Ves. 225. *Ramsbottom* v. *Gosden*, 1 V. & B. 165. *Rob* v. *Butterwick*, 2 Price, 190. *Beaumont* v. *Bramley*, 1 Turner, 41. *Ball* v. *Storie*, 1 S. & S. 210.

let a new term be raised for 500 years, for securing the maintenance and portions as they become due. UVEDALE v. HALFPENNY.

And since the recovery, as to part of the lands, has already barred the limitations in tail, with regard to those lands, (subsequent to the term for 500 years,) let the remainder in fee be limited to the eldest son.

But with respect to the lands in jointure, of which no recovery has been yet suffered, let there be a new settlement made thereof to the sons in tail, subsequent to the term of 500 years for raising the portions. [154]

The costs to go out of the estate. (1)

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(1) Reg. Lib. B. 1722. fol. 474.

COLT & al' *versus* WOOLLASTON *and* ARNOLD.

CASE 36.

At the Rolls. Bill in equity lies to recover back money paid on a bubble.

THE plaintiffs brought their bill to be repaid the two several sums of 120*l.* and 120*l.* which they had paid to the defendants, as managers and projectors of a bubble, called the *Land Security and Oil Patent.*

The defendant *Woollaston* had (it seems) invented a project for extracting oil out of *English* radishes, and got a patent for the sole exercise of this invention, having bought an estate for 31,800*l.* called *Sutton Marsh* in *Lincolnshire,* formerly the estate of Lady *Cornbury,* which was then in mortgage for 28,000*l.*

10. Sim. 74, 535.
2. Eq. 356.
3. — . 303.

In *June* 1720, this *Woollaston* made public this project and assigned his oil patent to the defendant *Arnold,* in trust for all the contributors towards the project, which he divided into five thousand shares, valuing every share at 20*l.* in order to raise 100,000*l.*

And as an encouragement and security for all the contributors, *Woollaston* conveyed his purchase of *Sutton Marsh* to the defendant *Arnold* and his heirs, in trust, in the first place, to pay off the two mortgages, being 28,000*l.* and afterwards to pay to himself (the said *Woollaston*) 57,200*l.* in all 85,200*l.* and as to the surplus which the estate would raise, it was to be for the benefit of the contributors; the project or bubble was to be called the *Land Security and Oil Patent,* and was represented by the defendants to be a most advantageous project without any hazard, there being land security given for the benefit of the contributors. [155]

The plaintiffs paid in to the defendant *Arnold* the several sums

COLT *v.* WOOLLASTON.

of 120*l.* and 120*l.* for six shares a-piece, for which *Arnold* gave them receipts, and the projectors sold about 1000 tickets amounting to 20,000*l.*

In *August* 1720 the project failed, no oil having ever been made, or radishes sowed on the premises.

Whereupon the contributors, with some resentment, called upon the projectors for their money, which occasioned the projectors to advertise, that in six months time, they would return the money with interest; but afterwards this was refused.

Insisted for the defendants, that the plaintiffs being acquainted with this security as to the lands, they ought to resort thither; that there could be no imposition in this case, because the parties had notice; and the extracting oil out of radishes having had the sanction of a patent, could not be thought a cheat; and as to the advertisements, it was pretended they were gained by threatenings; and that the parties, admitting they were aggrieved, had their remedy at law.

[156]

Master of the Rolls: This is an imposition, to propose the surplus of the value of an estate with cost but 31,800*l.* (after 85,000*l.* charged upon it, which is much more than double the value) as a security to the contributors who laid out their money upon this project; it is giving them *moonshine* instead of any *thing real*, and the proof is very slight, whereas it ought to have been extremely strong; it is hard to believe, that any person would consent to be so imposed upon. And what makes it worse is, that this great sum of 57,200*l.* is reserved to the defendant the projector himself.

The gaining the patent can be no sanction to the cheat, because the patent does not secure the patentee, if it is not a new invention, but others may use the same, or if it be not the first patent, the patentee is not secure from an action; and patents of new inventions, as well as grants of other things, may be obtained by surprise and false suggestions.

If this were a fraud against any private or single person, a court of equity would relieve; *a fortiori*, where it is a fraud against great numbers, against multitudes, where the mischief is more extensive, and many families thereby ruined.

All frauds cognizable in equity as well as at law. (*a*) Post. 220. Stent versus Bailis.

It is no objection, that the parties have their remedy at law, and may bring an action for monies had and received for the plaintiffs' own use; for in cases of (*a*) fraud, the court of equity has a concurrent jurisdiction with the common law, matter of fraud being the great subject of relief here. (*z*)

(*z*) *Sowerby* v. *Warder*, 2 Cox, 268.

COLT *v.* WOOLLASTON.

Accordingly cases of this nature have frequently met with relief in this Court, as in *Aaron Hill*'s case, which was a patent for extracting oil out of beech, which was also divided into shares, (as this is) and a security proposed and agreed to be made of lands, which came out to be *terra incognita* betwixt the degrees of latitude 50 and 57; and in the principal case, the land, after the 85,000*l.* paid, seems to be worth as little as *Aaron Hill*'s.

And as to the pretence of gaining the advertisements by force, the contributors were angry, and had reason to be so, and one of the contributors (though it does not appear to have been either of the plaintiffs) threatened to cut the defendant's throats; but this all ended in an arrest of one of the defendants, which was a lawful proceeding, and after all these threatenings were over, the last advertisement was given out by the defendants on the 19th of *September* 1720.

Further it is just that the defendant *Arnold*, as well as the defendant *Woollaston*, should be charged; for as *Woollaston* was the first projector and procurer of the patent, and purchaser of the land, so *Arnold* was his trustee, accepted the conveyance, was the treasurer, received the money, and gave the receipts, was partner in the fraud, and plainly *particeps criminis*.

Therefore decree both the defendants to pay back to the plaintiffs their principal, interest and costs.

Note; the same decree was made in the case of *Spackman* versus *Woollaston*, which was the next cause in the paper, of the same nature, against the same defendants, and on the same project.

6. Sim. 17.

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CASE 37.

9 Mod. 9.
1 Stra. 568.
2 Eq. Ca. Ab. 416. pl. 8. 424. pl. 11.
One by will gives his executor 5*l.* for his care in performing the will, and makes no disposition of the surplus; but parol proof made of the intention and direction of the testator to the scrivener, that the executor should have the surplus; yet the surplus decreed to the next of kin.

(*Before Mr. Justice* Powis, *in the absence of my Lord Chancellor.*)

MARY *Smallman*, possessed of some personal estate, by will gave to her nearest relations 5*l.* a-piece, and made the defendant *Careless*, who was not related to her, sole executor, giving him 5*l.* for his care in *fulfilling* her will, and made no disposition of the surplus, and died.

There was some slight proof for (1) the next of kin, who now sued for the surplus of the personal estate; as that the

(1) This appears to be the only case in which parol evidence has been ad-

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testatrix had declared her intentions were, to give the surplus of her personal estate to her next of kin, in the same manner as her husband had disposed of the surplus of his personal estate to his next of kin.

But the person who drew the will swore, that the testatrix at the time of the making thereof, declared her intention to be, that if she left any surplus, her executor, who had been her very good friend, should have it; for that her relations had

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mitted in favour of the *next of kin.*—(*z*) In *Petit* v. *Smith*, ante, 1 vol. 7. *Lady Granville* v. *Duchess of Beaufort*, ante, 1 vol. 114. *Littlebury* v. *Buckley*, (cited) 2 Vern. 677. *Batchelor* v. *Searle*, 2 Vern. 736. *Hatton* v. *Hatton*, 2 Eq. Ca. Ab. 443. pl. 56. *Duke of Rutland* v. *Duchess of Rutland*, post. 210. *Lake* v. *Lake*, 1 Wils. 313, and Amb. 126. S. C. parol evidence, has been admitted in favour of the *executors*, or (what is tantamount) in *exclusion* of the next of kin, as in *Brasbridge* v. *Woodroffe*, 2 Atk. 68. and the ground of its admissibility is, that it is adduced to rebut a presumption raised against the legal title of the executor, which seems to have been adopted as a rule of evidence in courts of equity, though (occasionally) with some hesitation. *Countess of Gainsborough* v. *Earl of Gainsborough*, 2 Vern. 252, and *Crompton* v. *North*, and *Kingsmill* v. *Cook*, there cited, *Lamplugh* v. *Lamplugh*, ante, 1 vol. 111. *Mallabar* v. *Mallabar*, Ca. temp. Tal. 78. *Brown* v. *Selwin*, Ca. temp. Tal. 240. and 4 Bro. P. C. 179. S. C. *Ulrich* v. *Litchfield*, 2 Atk. 373. *Walker* v. *Walker*, 2 Atk. 99. *Blinkhorn* v. *Feast*, 2 Vez. 28. *Brady* v. *Cubitt*, Doug. 39. *Coote* v. *Boyd*, 2 Bro. C. C. 525. *Clinton* v. *Hooper*, 3 Bro. C. C. 201. (*y*)

(*z*) It was rejected in *White* v. *Williams*, 3 V. & B. 72. Coop. 58. But if the executor adduces parol evidence to rebut the presumption against him, the next of kin may also read parol evidence to fortify it. *Bishop of Cloyne* v. *Young*, 2 Vez. 91, and the cases cited in the next note.

(*y*) See also, upon the admissibility of parol evidence to rebut or fortify presumptions, I. against the legal title of executors, *Nourse* v. *Finch*, 1 Ves. jun. 358. *Hornsby* v. *Finch*, 2 Ves. jun. 78. *Clennell* v. *Lewthwaite*, ib. 465, 644. *Trimmer* v. *Bayne*, 7 Ves. 508. *Williams* v. *Jones*, 10 Ves. 77. *Walton* v. *Walton*, 14 Ves. 318. *Langham* v. *Sanford*, 17 Ves. 435. 2 Mer. 6. *Gladding* v. *Yapp*, 5 Madd. 56. *Lynn* v. *Beaver*, 1 Turner, 63. II. Of the satisfaction of legacies, portions, &c. by payment, *Debeze* v. *Mann*, 2 Bro. C. C. 165, 519. 1 Cox, 346. *Ellison* v. *Cookson*, 2 Bro. C. C. 307. 3 Bro. C. C. 61. 1 Ves. jun. 100. *Freemantle* v. *Bankes*, 5 Ves. 84. *Pole* v. *Lord Somers*, 6 Ves. 309. *Druce* v. *Denison*, ib. 385. *Trimmer* v. *Bayne*, ub. sup. *Robinson* v. *Whitley*, 9 Ves. 577. *Hartopp* v. *Hartopp*, 17 Ves. 184. *Monck* v. *Lord Monck*, 1 Ball & B. 305. *Dwyer* v. *Lysaght*, 2 Ball & B. 156. *Thellusson* v. *Woodford*, 4 Madd. 420. *Bell* v. *Coleman*, 5 Madd. 22. III. Of the satisfaction of portions by legacies, *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516. IV. Of the satisfaction of debts by legacies, *Wallace* v. *Pomfret*, 11 Ves. 542. V. Of the accumulation of legacies given by different instruments, *Osborne* v. *Duke of Leeds*, 5 Ves. 369. *Hurst* v. *Beach*, 5 Madd. 351. VI. Of revocations of wills by implication, *Doe* v. *Lancashire*, 5 T. R. 49. *Gibbons* v. *Caunt*, 4 Ves. 848. VII. Of the intention of a parent that an estate purchased by him in the name of a child shall be an advancement for the child, Note to *Lamplugh* v. *Lamplugh*, ante, 1 vol. 111.

been ungrateful to her; and this person swore, that the testatrix had directed him to give the surplus to her executor, and that he would accordingly have done this by express words, but that he thought it would be unnecessary, the law implying as much.

For the plaintiffs it was argued, that here was an express legacy given to the executor, which implied he should have no more; that it plainly imported a negative, otherwise the executor would have *all and some;* and that it was still stronger, by the legacy's being given to the executor expressly, for his care in *fulfilling* the will, which was a declaration of a trust in the very words of the will, and tantamount to calling him executor in trust; that the cases of *Littlebury* versus *Buckley*, and Lady *Granville* versus Duchess of *Beaufort*, were not so strong, (viz.) in those wills, the legacies were not given to the executors for their care and pains. [159]

And lastly, that in the case of *May* versus *Lewin* (1), Lord Chancellor *Parker* had decreed in favour of the next of kin, purely on account of the legacy's being given to the executors for their trouble in the execution of the will.

On the other side it was said, that the evidence of the scrivener who drew the will was very strong, proving, that the testatrix, at the time when her will was made, declared her executor, and not her relations, should have the surplus; that these parol declarations had been always admitted for evidence, when they were agreeable to the disposition made by the law in such cases, and only rebutted and barred a trust, which, as the next of kin pretended, resulted for their benefit; and Mr. *Talbot* observed, that in the case of *Ball* and *Smith*, the legacy of plate to the wife who was made executrix, was construed not to bar her of the surplus, merely from a presumption that the husband had a greater kindness for his wife, than to leave her little more than a troublesome executorship; *a fortiori*, where there was evidence of the testator's express

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1 Ves. 358.

(1) The case of *May* v. *Lewin* was this.—*Beatrice Miller* by her will of 2d *December*, 1717, after payment of her debts, legacies and funerals, devised all her lands and tenements, and the rents and profits thereof and the produce of all her money and other personal estate, to the plaintiff and the defendant *Lewin* and their heirs, on trust to sell the said real and personal estate and pay the interest of the money arising by such sale to her mother for life; and the testatrix then gave some small legacies to be paid after the death of the mother, and appointed the plaintiff and the defendant *Lewin* executors of her will, and gave them 50*l.* a-piece for their trouble therein; but she made no disposition of the residue.—The Court declared the executors to be trustees of the residue for the next of kin. Reg. Lib. B. 1720. fol. 196.

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declaration, that his executor, and not his next of kin, should have the surplus, he should be entitled thereto; that the case

[160] of *Littlebury* and *Buckley*, as also that of the Duchess of *Beaufort*, were decrees in point, in the highest court of justice, which had been followed by many others, particularly that of *Heron* (1) versus *Newton*, decreed last term by the Master of the Rolls, where, though a legacy was given to the executor, who was no relation, yet was the surplus also decreed to him, upon proof read of the testator's intention that it should be so.

Mr. Justice *Powis:* The opinion of the great seal has been various and uncertain in this point; but I do not like parol evidence of the intention, and here we have parol evidence on both sides; however the words of the will seem to declare a trust, by giving the 5*l.* legacy to the executor for his care in *fulfilling* the will; and this goes beyond all parol proof; so that my thoughts at present are, that the next of kin are entitled to the surplus; but forasmuch as this has been determined different ways, I would take further time to consider of it, and to look into precedents.

On the 2 *July* 1723, Mr. Justice *Powis* sat again to give his opinion; he said, this had been *vexata quæstio*, Chancellors having differed about it from the House of Lords, and also from one another; he took notice what various turns the first case, (viz.) that of *Foster* v. *Munt* had met with; how Lord *Jefferys* had decreed in it for the next of kin, after which his decree was reversed by the Lords Commissioners, and their decree reversed by the House of Lords; so in the case of the Duchess of (2) *Beaufort*, and that of (3) *Littlebury* versus *Buckley*, the decrees in favour of the next of kin were, on parol proof, reversed above.

[161] But in the principal case, he said, there were words in the will declaring the executor to be but a trustee; 5*l.* being given him for his care in *fulfilling* the will, which would amount to a declaration of the trust (*z*); especially considering it as a fundamental rule in a court of equity, that an executor is but a trustee, and on his dying intestate, so much of the testator's

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(1) 9 Mod. 11. and Reg. Lib. A. 722. fol. 231. where the bill appears to have been dismissed on reading *the proofs* in the cause.

(2) Decreed by *Lord Cowper*, in *Feb.* 1709. reversed by the Lords in the *December* following.

(3) Decreed in the Mayor's Court by Sir *Peter King*, Recorder, in *April* 1711. and reversed by the Lords in the *May* following.

(*z*) See note to *Farrington* v. *Knightly*, ante, 1 vol. 550.

personal estate as remains unadministered, must go to the testator's next of kin, (viz.) to the administrator *de bonis non, &c.* and not to the administrator of the executor; that if a man marries an executrix, and she dies intestate, the testator's personal estate must go to the administrator *de bonis non,* and not to the husband; that Mr. *Harcourt* married Lady *Astrey,* who was executrix to Sir *Samuel Astrey,* and when she died intestate, Sir *Samuel's* personal estate which remained unadministered, was determined to go to Lady *Astrey's* next of kin, and not to Mr. *Harcourt* the husband; that a plaintiff executor pays no costs; but this not by any express words of the statute (*a*), but only by an equitable construction thereof, because what he recovers, is not for himself, but in trust for his testator; he did not deny, but that where there was an express legacy given to the executor, and no further words, nothing given for his care and pains, parol evidence might, in such case, be admitted of the testator's intention; but this was not to be minded, where words followed declaring a trust, as where the legacy appeared to be given to him for his care in *fulfilling* his will; that if money were to be granted or devised for *the doing* of any thing, this, in equity, would create a trust, and here the legacy was given to the executor for his care, &c.

(*a*) 23 Hen. 8. cap. 15.

That indeed here was the evidence of the person who drew the will, tending to prove that the surplus was designed for the executor, which nevertheless was contradicted by evidence on the other side; however, less regard ought to be had to evidence of this kind, in cases of wills, than of deeds, it being very usual for many, under such circumstances, to play the *Volpone,* and to speak what they do not really intend, to get every one's favour.

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That in the case of *May* versus *Lewin,* where there was 50*l.* a-piece given to the two executors for their trouble, (in which case there was also some parol proof of the testator's intention in favour of the executors, but not clear,) Lord *Parker* decreed a distribution, which was an authority in point, and being the latest, was the greatest authority, because it must be supposed to have been adjudged after consideration had of all the former decrees; besides, that the defendant, in the principal case, was made executor in the same clause which gave him the legacy, whereby it should seem that the legacy was annexed to the executorship, as all the reward intended for it.

Reserve costs till after the account taken, but decree a distribution amongst the next of kin.

CASE 38.

HALL *versus* HODDESDON.

At the Rolls. 2 Eq. Ca. Ab. 491. pl. 7. Bill to perpetuate the testimony of a will, if brought to hearing, to be dismissed with costs.

THIS bill was brought by a devisee of land, to perpetuate the testimony of a will, and to establish the will; and upon opening thereof, the Master of the Rolls dismissed the bill with costs; declaring that this cause being only for perpetuating the testimony, ought not to have been set down for hearing. (*z*)

[163] And upon Mr. *Mead*'s praying, on behalf of the plaintiff, that the dismission might be without prejudice to the plaintiff's making use of the depositions,

His Honour replied, there was no need of this, because the plaintiff would at law have the benefit of these depositions, though the bill were dismissed. (*y*)

(*z*) So *Anon.* Amb. 237. *Vaughan* v. *Fitzgerald,* 1 Sch. & L. 316. And a prayer for relief, (as here to establish the will) ought not to be added to a bill to perpetuate testimony. *Vaughan* v. *Fitzgerald,* ub. sup. *Rose* v. *Gannel,* 3 Atk. 439.

(*y*) See *Backhouse* v. *Middleton,* 1 Cha. Ca. 175. *Anon.* and *Vaughan* v. *Fitzgerald,* ub. sup.

CASE 39.

BATTEN *versus* EARNLEY.

At the Rolls. 2 Eq. Ca. Ab. 456. pl. 9. One by will gives an annuity out of his personal estate; if the executor has misbehaved himself, the Court will order part of the personal estate to be set aside to secure this annuity.

ONE gave several legacies by will, and (*inter alia*) an annuity of 20*l.* per annum, to *J. S.* for his life, all which were devised out of the testator's personal estate, and *J. N.* was made executor of this will.

3. P. Wms. 460.
8. Sim. 586.

It happened that *J. N.* the executor had said some rash words, as, "that he would go to gaol, and leave the legatees "unpaid;" and though the annuity was by the will made payable quarterly, yet it was three years in arrear.

Insisted, 1*st*, for the annuitant, that these arrears should carry interest.

Sed Cur cont': This is only done, where there are great arrears; but it is not usual to compute interest for so small a sum. (*x*)

(*x*) See *Litton* v. *Litton,* ante, 1 vol. 541.

2*dly*, It was prayed, that the executor should give security for the payment of the annuity.

To which it was answered, that the testator not ordering any security, but wholly trusting to the executor, the legatee of the annuity must do so too. (*y*)

Sed per Cur: Since the executor has by his answer submitted it to the Court, whether he should give any security, and appears to have expressed himself in words threatening to defeat the annuity, let the Master see a sufficient part of the personal estate set apart and assigned to a trustee, in trust to secure the annuity. [164]

(*y*) See *Slanning* v. *Style*, post vol. 3. 334.

CROCKAT *versus* CROCKAT.

CASE 40.

At the Rolls.

2 Eq. Ca. Ab. 569. pl. 3. One placed 500*l.* in a goldsmith's hands on his note, and afterwards orders part out again, and then devises the 500*l.* in the goldsmith's hands to *J. S.* this good for the whole 500*l.*; secus if the testator had, after the making the will, drawn out part of this money, for this had been an ademption pro tanto.

THE testator gave to the plaintiff his sister *Susanna Crocket* the sum of 550*l.* which was then in Mr. *Ellis*'s hands, and made the said Mr. *Ellis* executor in trust for the said testator's brother, and died soon after the making of the will.

It seems the testator, before making of the will, had left in Mr. *Ellis*'s hands 550*l.* for which Mr. *Ellis* had given a note to the testator, payable to him or order, and the testator had, before the making the will, drawn some bills on *Ellis*, ordering him to pay several small sums of money, which, in all, had reduced the 550*l.* to 430*l.*

But the testator had left in Mr. *Ellis*'s hands an exchequer order, for the payment of 36*l.* per annum to the testator for thirty-two years, and left assets for the payment of all his legacies, including the whole legacy of 550*l.* to his sister *Susanna*.

Insisted, the plaintiff *Susanna Crocket* shall have no more than 430*l.* of her legacy of 550*l.* there being no more than 430*l.* left in Mr. *Ellis*'s hands.

Master of the Rolls cont': She shall have the whole 550*l.* legacy. [165]

Where a testator by his will gives a legacy of 500*l.* which is in the hands of *J. S.* and after the making of the will calls it in, or orders *J. S.* to pay to himself or others, part of the money, which is accordingly done, this is an ademption of such

CROCKAT *v.* CROCKAT.

part of the legacy; and the diversity is, where the party who had the money pays it of his own choice, and uncalled for, and where the testator himself (†) calls for it in; for it must be the testator's own act, and not the act of a third person, which is to revoke his will.

But in the principal case, these payments out of the 550*l.* in the hands of Mr. *Ellis* having been all ordered by the testator before the making of his will, this cannot be said to be an ademption of the legacy, but is an express indication of the testator's intention, that as the note for the full sum of 550*l.* was still standing out, notwithstanding he had ordered the payment in of part of the note, yet he renounced all those payments, and willed that the whole 550*l.* should be the legacy which he gave to his sister *Susanna*.

But I take it, that the 550*l.* legacy shall not be made good out of the exchequer order for the thirty-two years annuity, the legacy given being a legacy of 550*l. in money*.

Let the plaintiff have the whole 550*l.* note, and interest from the time of filing the bill.

(†) But the diversity between a voluntary and a compulsory payment, seems not to have been approved of by Lord *Macclesfield*, since the latter might be with an intent to secure the legacy in all events. See the case of *Earl of Thomond* v. *Earl of Suffolk*, ante, vol. i. 461. See also the case of *Rider* v. *Wager*, post 328. and *Ford* v. *Fleming*, decreed by Lord Chancellor *King*, Trin. 1728, post 469. and 1 Eq. Ca. Abr. 302. pl. 3.

CASE 41.

* TRENCHARD *and* IPPSLEY *versus* WANLEY.

2 Eq. Ca. Ab. 724. pl. 2. A goldsmith, without any orders from the proprietors, subscribed lottery orders into the South-sea, indemnified by the act of parliament.

THE plaintiff Mrs. *Ippsley*, the sister of the other plaintiff *Trenchard*, had money in the hands of the defendant *Wanley* the goldsmith, for which she had the said *Wanley*'s note.

[* 166] The plaintiff *Trenchard*, by his letter to the defendant *Wanley*, ordered him to invest the money in lottery orders, but did not direct in whose name those lottery orders should be taken.

Accordingly the defendant *Wanley* did invest the money in lottery orders, and took them in his own name; afterwards *Wanley* subscribed the orders into the *South-sea*, with other orders of his own, and of his customers, amounting to a considerable sum, of the same specie, but did not give notice that he had made this subscription, until two months afterwards.

Upon this the plaintiffs brought their bill for relief, (viz.) in

order to compel the defendant to procure for them lottery orders, to the amount of those which the defendant, without their consent, had subscribed into the *South-sea*.

And for the plaintiffs it was insisted, that the defendant had made himself a trustee for them without any authority from them: and after he had thus made himself their trustee without their consent he then subscribed their orders into the *South-sea*, and by concealing so long from them what he had done, he thereby shewed his intention, that if the subscription had been profitable, then the orders subscribed were to have been his; if unprofitable, then they were to be placed to the plaintiff's account.

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Master of the Rolls: The rule of law as to fraud is also a good rule in equity, (viz.) that fraud is never to be presumed; but it is true, that may be a fraud in equity, which is not so at law.

The confusion and hurry that goldsmiths and other people were then in, may account for the defendant the goldsmith's not giving notice sooner of his having subscribed those orders into the *South-sea;* and it may with the same force be retorted against the plaintiffs, as the reason, why they did not come sooner to the defendant to demand the orders, or forbid the subscribing them into the *South-sea;* though I think that by the words of the act of (*a*) parliament empowering all trustees, guardians, executors and administrators, to subscribe lottery orders into the *South-sea*, though the *cestui que trust* had in this case expressly forbid the trustee to subscribe, yet by virtue of the express authority given to trustees, &c. to subscribe (in which authority given by parliament the consent of every proprietor and *cestui que trust* is included, notwithstanding such prohibition as aforesaid,) the subscription would be good, and the trustees justified; and it would be a very unjust thing in the parliament, if it were to be construed, that the act had made the subscription good, and yet left the trustee liable to be sued, and to be answerable for the same to the *cestui que trust*.

(*a*) 6 Geo. 1. cap. 4. sect. 23.

But the principal case does not go so far, here being no prohibition from the *cestui que trust*.

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The occasion of the defendant the goldsmith's buying the orders in his own name might be, because he was always in the way to accept them, and there was no direction from the plaintiffs to buy the orders in any other name; and by the same reason, that the plaintiffs trusted the defendant with the money, they might likewise intrust him with the taking of the orders in his own name.

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Then from the time of the defendant the goldsmith's taking the orders in his own name, he became a trustee, and being a trustee, the act of parliament alone, without any authority from the party, empowered him to make this subscription. And the case is the stronger, in that the defendant subscribed other orders of his own, as well as those that belonged to the plaintiffs; and it would be enough for the defendant who dealt for the plaintiffs as for himself, and acted for them as he did for himself, to bear his own loss, without having the additional loss of the plaintiffs also put upon hi.

It is to be taken, as the general sense of the nation took it at the time when the subscriptions were made, (viz.) that this was a beneficial thing, as is evident from those lottery orders, that were subscribed, selling for more than lottery orders unsubscribed. So that nothing but fraud in this case of subscribing lottery orders, &c. can make the trustee answerable to his *cestui que trust.*

Besides, the subsequent statute of 7 *Geo.* 1. *cap.* 1. *sect.* 3. very much strengthens the case, "by giving the proprietor of "the stock 33*l.* 6*s.* 8*d. per cent'.* in satisfaction, and full dis- "charge of the monies paid on any of the subscriptions, not- [169] "withstanding any misnomer, or error, supposed defect, error "or misnomer, or notwithstanding any misnomer, mispelling, "or omission of entry of any subscription, and notwithstand- "ing any doubt or question touching or concerning the validity "of the subscription of the redeemable debts and annuities in "any wise."

Which words were intended to bind down the proprietors of any redeemable subscription, and to give them a recompense for their being bound down; and as it bound down the trustees, so likewise did it conclude the *cestui que trust.*

And this act of parliament intended to quiet all matters.

Also his Honour laid great stress upon a decree which he himself had made about a year since, when he sat at *Westminster* for the Lord Chancellor, in the cause of *Bluck* versus *Nichols*, and which he said was not so strong for the defendant as the principal case; for there lottery tickets payable to the bearer, and which were left with the banker or goldsmith only for safe custody, were subscribed by him into the *South-sea;* upon which the proprietor, who left them with him, brought a bill against the said goldsmith; and his Honour dismissed the bill: for that it was a hard case, that the goldsmith who was but a trustee should suffer for doing what was then thought to be for

the best; and if the plaintiff was wronged, he was at liberty to take his remedy at law. TRENCHARD v. WANLEY.

Which decree the Court had the greater regard to, forasmuch as the parties acquiesced under it, and brought no appeal.

But the principal case the Master of the Rolls thought much stronger, and therefore dismissed the bill with costs, (viz.) that [170] with respect to the defendant, both the plaintiffs should be liable, and therefore the dismission should be general, as to both of them; but that if the plaintiff *Trenchard* thought it worth his while to apply, the Court would, on petition, order that the other plaintiff the *cestui que trust* should pay all the costs.†

† The same point was determined by Lord *Macclesfield* in the following term, in the case of *Weaver* v. *Fowler*.

DE COSTA *versus* SCANDRET. CASE 42.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 636. pl. 2. A merchant having a doubtful account of his ship, insures his ship without acquainting the insurers what danger the ship was in; this held to be a fraudulent insurance; and the Court relieved against the policy.

ONE having a doubtful account of his ship that was at sea, (viz.) that a ship described like his, was taken, insured her, without giving any information to the insurers of what he had heard, either as to the hazard, or circumstances which might induce him to believe that his ship was in great danger, if not actually lost.

The insurers bring a bill for an injunction, and to be relieved against the insurance as fraudulent.

Lord Chancellor: The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it; for if this had been discovered, it is impossible to think, that the insurers would have insured the ship at so small a *premium* as they have done, but either would not have insured at all, or would have insisted on a larger *premium*, so that the concealing of this intelligence is a fraud.

Wherefore decree the policy to be delivered up with costs, [171] but the *premium* to be paid back, and allowed out of the costs. (z)

(z) See *Wilson* v. *Duckett*, 3 Burr. 1361. But at law a fraudulent assured cannot recover the premium. *Tyler* v. *Horne*, *Chapman* v. *Fraser*, Park, Insurance, 6th edit. 285, 286.

CASE 43.

EDWARDS (*and* LADY ELIZABETH *his Wife*) *versus* COUNTESS DOWAGER OF WARWICK.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 42. pl. 3. Money covenanted to be laid out in land, shall descend as land. But he that is entitled to the fee of the land when purchased, may dispose of it by a will, though not attested by three witnesses. Also a parol direction for the payment of it, seems to be good. So if the money is ordered or devised to be laid out in lands, and settled to the use of *A.* in tail, remainder to himself in fee, equity will order the money to *A.* Secus if the remainder thereof be limited to a third person. Also though by a voluntary contract money is agreed to be laid out in lands, the court will execute such agreement in favour of the heir.

EDWARD late Earl of *Warwick* and *Holland*, being seised in fee of the manor of *Kensington*, intermarried with the defendant *Charlotte* daughter of Sir *Thomas Middleton*, who had a portion of 16,000*l.* 6000*l.* whereof was paid to the said Earl, and 10,000*l.* residue thereof, to be laid out in a purchase of lands in fee, to be settled as in the settlement and hereafter is mentioned, and the manor of *Kensington* was settled on the said Earl for life, remainder to the first and every other son of that marriage, in tail male, remainder to himself in fee.

As to the 10,000*l.* it was agreed by all the parties, that the same should be laid out in land, and settled in like manner as the manor of *Kensington* had been settled, and in the mean time, until such purchase could be found, the 10,000*l.* was to be placed out upon securities, and the interest arising therefrom, to go and be paid to such persons as should be entitled to the rents and profits of the manor of *Kensington.*

[172] This *Edward* Lord *Warwick* died, leaving issue by the Countess *Charlotte*, one son, (viz.) *Edward-Henry*, the last Lord *Warwick*, who being thus entitled to the manor of *Kensington* in tail, remainder to himself in fee, levied a fine of the said manor to the use of himself in fee, and soon afterwards died without issue, and intestate; upon whose death the manor of *Kensington* descended to the plaintiff Lady *Elizabeth Edwards*, wife of the plaintiff Mr. *Edwards*, who, as she was become entitled to the manor of *Kensington* in possession in fee, now brought her bill to have the mortgage, upon which the 10,000*l.* had been placed out, assigned to her.

This was opposed by the defendant the Countess dowager of *Warwick*, who insisted, that she was entitled to the same, as administratrix of the last Earl her son, and that this 10,000*l.* being as yet in itself money, ought, by the statute of distribution, to be divided betwixt herself, as the mother of the intestate, and his half sister Mrs. *Charlotte Addison*; and for this purpose it was argued, 1*st*, That all the ends and views of the settlement, (viz.) the provision for the issue of that marriage, being determined by there being no issue left of the marriage,

and in regard this was in fact money, a court of equity, whose assistance was necessary to realize it, would not now the husband was dead without issue, turn this money into land, in favour of an heir, who was not within the view of the settlement.

2*dly*, That this money thus agreed to be laid out, was not in all respects, to be taken as land; for it might be devised as money, by a will not attested by three witnesses; also, if the last Earl of *Warwick* had granted or devised it, by the description of the ten thousand pounds agreed by his father to be laid [173] out in land, it would have passed by such description; it could not be denied but that the last Earl might, if he had pleased, have so disposed of it.

3*dly*, That as to the settlement of the remainder of the *Kensington* estate to the right heirs of Earl *Edward* the father, the same was a mere voluntary limitation, as was also the agreement, that the money should be laid out in land, and settled in like manner; and then it was no more, than if one, without any consideration, should covenant to lay out money in the purchase of lands, to the use of himself in fee; which being a mere voluntary contract, equity would not compel the execution thereof.

4*thly*, That it was unreasonable for this Court to interpose to take the money from the mother and the half sister, in order to give it to a remoter relation; on the contrary the mother, who had the legal interest of this mortgage, on which the money was lent, ought to be assisted, at least not deprived of it, by a court of equity.

5*thly*, That if the last Lord *Warwick* had applied to the Court to be paid the money, he would have obtained an order for that purpose. Nay, though he had not levied the fine, but had continued tenant in tail, remainder to himself in fee, and had desired the money, the Court would have ordered it to him, as had been done in the like cases (*a*); (which Lord Chancellor admitted,) in regard the last Lord had both the estate-tail and the immediate remainder to himself in fee; so that a fine without a recovery would have barred the estate-tail and remainder, and a fine might be levied at any time, as well in vacation, as in term.

(*a*) See the case of Short and Wood, vol. 1. 470.

And lastly, It was urged, that the last Earl of *Warwick* [174] having levied a fine of the manor of *Kensington*, to the use of himself and his heirs, this had extinguished the limitations in tail created by the settlement, and had, as it were, put the settlement out of the case; and as the settlement, as to the manor of *Kensington* was out of the case, so the trusts of the

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10,000*l.* which were to attend the settlement of the manor of *Kensington*, were at an end also.

For all which reasons it was insisted, that the plaintiff, though entitled to the manor of *Kensington*, had not, however, any right to the 10,000*l.* or to compel the laying out of this money in land.

Lord Chancellor: If there had been so much as a parol (1) direction from the last Lord *Warwick*, for the payment of this 10,000*l.* to his mother the Countess dowager, I should have had a regard to it; being of opinion, that it was in the election of the last Earl to have made this money, or to have disposed of it as money.

As to the late Earl's levying a fine of the manor of *Kensington*, that is immaterial; for he had as good a power before the fine, to dispose of the said manor, or of the 10,000*l.* in money, against all but his issue, as he had after the fine; and issue he never had.

To say, that this fine, as it comprised the manor of *Kensington*, so did it also the trust of this 10,000*l.* (though it seems absurd to talk of levying a fine of money) will do the defendant no service; nay, if admitted, it would make against her; because by the deed of uses the use of the fine is declared
[175] to be to the conusor and his heirs, and consequently would entitle the plaintiff the Lady *Betty Edwards* to this money.

But when I admit that the last Lord *Warwick* had an election to make this 10,000*l.* money, still I conceive he must do something (2) to determine such election, which he has not done in

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(1) Sed vide *Bradish* v. *Gee*, Amb. 229. (*z*)

(2) This seems the point on which the cases in some measure differ, *i. e.* whether the mere circumstance of the fund remaining, in the shape of money in the hands of the person absolutely entitled to it in all events, shall of itself be evidence of the party's intention to give it the quality of personal estate, (for the cases agree that any proof of such intention will conclude the question (*y*) and if *not*, whether the heir has any equity against the personal representative in this respect? vide *Chichester* v. *Bickerstaff*, 2 Vern. 295. *Lingen* v. *Sowray*, ante, 1 vol. 172. *Lechmere* v. *Earl of Carlisle*, post. 3 vol. 211. and Ca. temp. Tal. 80. *Guidot* v. *Guidot*, 3 Atk. 254. *Crabtree* v. *Bramble*, 3 Atk. 680. *Bowes* v. *Earl of Shrewsbury*, 5 Bro. P. C. 269. *Bradish* v. *Gee*, Amb. 229. (*z*) *Hewitt* v. *Wright*, 1 Bro. C. C. 86. *Pulteney* v. *Earl of Darlington*, 1 Bro. C. C. 223. (*x*)

(*z*) S. C. Kenyon, 73.

(*y*) *Thornton* v. *Hawley*, 10 Ves. 129. *Triquet* v. *Thornton*, 13 Ves. 345. and see the cases in note (*x*)

(*x*) Notwithstanding *Walker* v. *Denne*, 2 Ves. jun. 170. and *Wheldale* v. *Partridge*, 5 Ves. 388, (as to which last see S. C. on Appeal, 8 Ves. 227.) the later cases have decided that where money has once been impressed with

the present case; and then, in a court of equity, the heir is ever preferred (*a*) to an administrator.

This appears by the common case, that if a man dies indebted by bond, in which he has bound himself and his heirs, and leaves real and personal assets, of each enough to pay the bond, and the obligee, as he has an election to come upon the real assets, does accordingly sue the heir, and recovers the debt against the heir, yet the heir shall recover back the money against the executor out of the personal estate.

(*a*) See the case of Lingen versus Sowray, vol. 1. 172.

As to the objection, that the plaintiff claims under a voluntary limitation, it has been held, (*b*) that the consideration for the precedent limitations in a marriage settlement, has been applied even to the subsequent ones; as where, in consideration of a marriage, and portion, land has been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a brother, these considerations have extended to the brother; and the reason is, because it may be very well intended, that the husband, or his parents, would not have come into this settlement, unless all the parties thereto had agreed to the limitation to the brother.

(*b*) See the case of Osgood versus Strode, post. 245.

But admitting that the limitation of the remainder in fee was voluntary, yet this will not alter the case: because I take it to be clear, that if I voluntarily, and without any consideration, covenant to lay out money in a purchase of land, to be settled on me and my heirs, this Court will compel the execution of such contract, though merely voluntary; for in all cases, where it is a measuring cast betwixt an executor and an heir, the latter shall, in equity, have the preference.

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Though all the interest due upon this mortgage at the time of the death of the last Earl, must go to the Countess of *Warwick*, as his administratrix.

And (as I understood his Lordship) though the last Earl died in a broken part of the half year, this interest should (he said) not be taken as (†) rent, but should be apportioned, and a proportion thereof go to his administratrix.

† Vide ante, vol. i. 392. *Jenner* v. *Morgan*. See also where the Court apportioned maintenance-money, in the case of *Hey* v. *Palmer*, post. 501.

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the character of land, or *vice versâ*, the mere circumstance of the fund remaining unconverted in the hands of the person entitled to it in all events is not evidence of his intention to alter its character; and that in such cases the heir has an equity against the personal representative, and *vice versâ*. *Biddulph* v. *Biddulph*, 12 Ves. 161. *Kirkman* v. *Miles*, 13 Ves. 338. *Van* v. *Barnett*, 19 Ves. 102. *Ashby* v. *Palmer*, 1 Mer. 296. *Stead* v. *Newdigate*, 2 Mer. 521. *Smith* v. *Claxton*, 4 Madd. 484. *Tregonwell* v. *Sydenham*, 3 Dow, 207.

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But as to all the interest due since the death of the late Earl, the same was decreed to belong to the plaintiff the Lady *Betty Edwards*, the heir.

And on these terms, the security for the 10,000*l.* was ordered to be assigned to the plaintiff the Lady *Betty Edwards*, and no costs on either side.

Afterwards, on an appeal brought by the Countess of *Warwick*, this decree was affirmed in the House of Lords. (1)

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(1) 2 Bro. P. C. 494.

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EARL OF SUFFOLK *versus* HOWARD.

CASE 44.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 285. pl. 1. A peer disinherited by his ancestor is entitled to the favour of the Court, and on bill and answer, to have the family deeds brought before the master, in order to see whether any thing can be discovered for his advantage.

THE late Earl of *Suffolk* and *Bindon*, having no issue, but having two brothers, (viz.) the present Earl, and the defendant *Charles Howard* who had a son, and conceiving his next brother the present Earl to be extravagant, the late Earl cut off the entail by a recovery, and by deed and will settled the estate on his brother the defendant *Charles Howard*, for life, with remainder to his first son (then in being) for life, with remainder to trustees to preserve the contingent remainders, remainder to the first, &c. son of that first son in tail male, charging the estate only with 100*l.* per annum annuity to his next brother the present Earl, and died without issue.

The present Earl brought a bill to discover the defendant's title, setting forth the old entail, under which he was heir male; and praying that the writings might be produced, and that the arrears of the annuity might be paid him.

The defendant shewed by answer, that the late Earl had by deed enrolled made a tenant to the *præcipe*, and had suffered a recovery to the use of himself in fee, and afterwards made a settlement as above; that as to the pretended arrears of the annuity, he had paid the plaintiff the present Earl, more than those arrears came to, by about 12*l.* and though he had taken no receipt for them, he intended those payments in part of the annuity.

And on a motion to be paid the arrears of the annuity, and to have all the writings produced before the Master,

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Lord Chancellor: This is a hard case; equity even for younger children, supplies the want of a surrender of a copyhold, and puts them on a level with creditors, taking it to be a

Earl of Suffolk *v.* Howard.

debt by nature from a father to provide for all his children, as well the youngest as the eldest.

But is it not a stronger case, where the King has bestowed an honour on a family, whereby the heir of the honour is *consiliarius natus*, and sits as a judge in the highest court, the House of Lords? surely it is incumbent on the ancestor to leave some provision for the maintenance of the honour, and looks like want of gratitude to the Crown, (from whence this honour did arise,) to leave it naked, especially where the ancestor had a great estate in his power, and has given it from the earldom, leaving such a trifle as only 100*l.* a year to the present Earl.

Ingratitude to the Crown for a peer to devise away the estate from the honour.

Therefore more ought to be done in this case for the plaintiff, than in a common case; here is no purchaser, and there seems no necessity to bring the cause to a hearing; for that would be only putting both sides to great charges, which would be still harder on the Earl, as he is so little able to bear it.

Let the defendant bring before the † Master all deeds and writings, and let the plaintiff the present Earl, either by himself or agents, have the inspection of them, that if any thing has slipped the conveyance, or if the entail be not well docked, he may have the benefit thereof. [179]

And the answer not being positive, as to the payment of the arrears of the annuity, or that the payments which were made to the plaintiff, were in part of the annuity, (it being only said that the defendant intended them so, which intention none could know, since he did not then declare it,) and because the defendant has not taken or insisted upon any receipts from the present Earl, and the late Earl has been dead two years, let the defendant pay the plaintiff 200*l.* being two years arrears of the annuity, subject to the order of the Court. (*z*)

† In the case of Sir *Edward Bettison* versus *Farrington & al'*, Trin. 1735, where the plaintiff claimed by virtue of a remainder in tail expectant on an estate-tail, and was heir male of the family, and the defendants were sisters, and the heirs general of the tenant in tail, and by their answer shewed that their brother, the tenant in tail, had suffered a recovery, and declared the use to himself in fee, referring to the deed in their custody; Lord *Talbot*, before the hearing, ordered the defendants to leave with their clerk in court the deeds making the tenant to the *præcipe*, and declaring the uses of the recovery. Post. 3 vol. 363.

(*z*) See *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66. *Aston* v. *Lord Exeter*, 6 Ves. 288. *Hylton* v. *Morgan*, ib. 293. *Sampson* v. *Swettenham*, 5 Madd. 16.

CASE 45. RAVENHILL *versus* DANSEY.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 645. pl. 18. A reversionary term raised for securing maintenance and portions for daughters, shall, in cases of necessity, be mortgaged to pay either, and when fallen into possession shall pay all the arrears of maintenance incurred before it came into possession.

UPON the marriage of *William Dansey* with the daughter of Sir *Francis Russel*, there was a term of 500 years limited to trustees, to raise portions for daughters, in case of no issue male by the marriage.

The trust of the term was to raise two thousand pounds a-piece for the daughters of the marriage, payable at their ages of eighteen, with maintenance-money at the rate of 40*l.* per annum, to each daughter from the deaths of their father and of Sir *Francis Russel* their grandfather by the mother's side, until their portions should become payable.

[180] The husband *William Dansey* died leaving two daughters, one eight and the other nine years old; the term did not commence in possession until the death of the father-in-law of this *William Dansey*, which happened some time afterwards.

The trust of the term was to raise the portions by sale, mortgage, or profits; but the trust to raise the maintenance was by rents and profits, so that there was a difference in the deed, between the manner of raising the portions, and that of raising the maintenance.

Whereupon it was objected, that the maintenance should not begin until the 500 years term commenced in possession, at which time only the same could be raised by rents and annual profits.

Lord Chancellor: It is against my opinion to raise a portion or maintenance by selling a reversionary term, and this under colour of the word [profits]; but it has been ruled before my time, that profits shall extend to any advantage which shall be made of the land by sale or mortgage, as well as rents; especially in cases of necessity, and when the daughter has had no other maintenance, it has been decreed to be raised by a mortgage of a reversionary interest of a term. (1)

But the present case is much stronger; for here the trust-term for raising this maintenance and portion is come into possession, so that at present, the maintenance-money may be raised out of the annual profits; it is like a rent granted out of a reversion to commence presently, in which case, though the

(1) Vide *Butler* v. *Duncombe*, ante, 1 vol. 448.

reversion does not fall into possession until many years after, yet when it does fall, it shall answer all the arrears. RAVENHILL *v.* DANSEY.

So let the arrears of the maintenance-money from the time the same became payable by the settlement, be raised out of this term.

Then it was objected, that the daughters had another provision by the will of their father, and also by descent from him.

But Lord Chancellor held this not to be material, as long as by the settlement there was no other provision except this maintenance money, until the portion should become payable, and any matter subsequent to the settlement ought not in justice to vary the construction thereof. Vide vol. 1. the case of Sandys versus Sandys, 707.

CRAVEN *versus* WRIGHT.

CASE 46.

Lord MACCLESFIELD.

On an answer's being reported not scandalous or impertinent, if the plaintiff except to the report, he must shew specially wherein it is scandalous or impertinent.

IF the plaintiff refers the answer for scandal and impertinence, and the Master finds the answer neither scandalous nor impertinent, the plaintiff on excepting to the Master's report, must in his exceptions shew wherein, in what line or page, and how far, the answer is scandalous or impertinent, in order that such part of the said answer may be expunged by the Master, and it is not sufficient in the exceptions to say in general, that the answer is scandalous and impertinent.

It seems to be a stronger case, where exceptions are taken to an answer for insufficiency, and the Master reports it sufficient, that the plaintiff in his exceptions to the Master's report, should shew wheren the answer is insufficient.

Also if a bill or answer be referred for scandal, and reported by the Master to be scandalous; if the Master has once expunged this scandal, the party cannot then except to the report, because when the scandal is expunged, it cannot be made appear by the record what that scandal was, and it was the party's own fault, that he did not except to the report sooner. (*z*)

1. *Y. & C.* 62, 228.
4. *Sim.* 537.
1. *Tu. & R.* 686.

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1. *Hare.* 468.

(*z*) *Norway* v. *Rowe*, 1 Mer. 135.

CASE 47.

BECKLEY *versus* NEWLAND.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 21. pl. 19. Two article, that whatever J. S. shall by his will leave to either of them should be equally divided betwixt both; such agreement good: also if after this one of them contrives that J. S. shall leave part of his estate to a third person in trust for him; this is within the articles.

THE plaintiff *Simon Beckley*, and Sir *George Newland*, married two sisters who were cousins and presumptive heirs of Mr. *Turgis* a very rich man; and *Beckley* and *Newland* had been for many years partners in the business of a scrivener; and Mr. *Turgis* had made and revoked several wills, but at length made a will in favour of Sir *George Newland*, whereby he left a great real and personal estate to Sir *George*, but gave only a small real estate to Mr. *Beckley*.

Before the execution of this will, the plaintiff *Beckley* and Sir *George Newland* entered into articles, whereby they agreed, that whatsoever should be given to either of them, should be equally divided.

And the words of the articles were plain as to the equal division of the personal estate of *Turgis*, which should be given by the will to either *Beckley*, or Sir *George Newland*; but as to the real estate, the words of the articles were doubtful, and
[183] seemed rather not to extend thereto; however, the plaintiff *Beckley* brought a bill against the executors of Sir *George Newland*, for an account of the real and personal estate which came to *Newland* by *Turgis*'s will.

Obj. These articles are unfair, and not to be encouraged, (viz.) to agree to divide a man's estate, while the man is living, and to share that in which the parties at the time of making the agreement, had no manner of right, and possibly might never have; and it is to disappoint the will of the testator, who, in all probability, would have given nothing to either of the parties to this agreement, in case he could have foreseen that his disposition should be frustrated as soon as ever he should die, nay, in his life-time was agreed to be divided.

Lord Chancellor: A performance of these articles ought to be decreed, though there was no other consideration for them, than the mutual benefit of the chance; the agreement to share, &c. is not disappointing the intent of the testator, for he did not design to put it out of either of the devisees power to dispose of the estate after it should come to him; but on the contrary, where the testator gave it to either of them, he by implication gave that person a power to dispose of the said estate when it should come to him. (1)

(1) Vide *Hobson* v. *Trevor*, post. 191.

And it seems to have some weight, that if there had been no such agreement for the sharing of the said *Turgis*'s estate, yet by law in right of their wives, (who were heirs presumptive to the said *Turgis*) these persons would have come in for equal shares; and to covenant to do that which the law would of itself have done had the party died intestate, cannot be unreasonable, for that would be to say, that the law itself is unreasonable, or unjust.

[184]

Suppose there were two daughters, and the father should leave almost all the estate to the eldest, and nothing or very little to the youngest; if there should be such an agreement as in the principal case, surely it would have been no more than what every one would have wished for; though I am far from grounding my decree only upon this circumstance.

As to the articles for sharing the land, if it could be proved, that after entering into them Sir *George Newland* had procured the testator to devise any lands to some third person in trust for the said Sir *George Newland*, this would have been taken as a devise to Sir *George* himself, and would have become liable to be shared within the articles.

2*dly*, But then in the present case it was insisted upon by the plaintiff *Beckley*, that after these articles entered into, Sir *George Newland* prevailed with the testator to devise the greatest part of his lands to the sons of Sir *George Newland*, who were then infants, and that as soon as the sons were come of age, Sir *George* got his two sons, to whom Mr. *Turgis* left the bulk of his real estate, to convey the lands to Sir *George* and his wife for their lives with remainder to trustees for a term of years, in trust to raise 3000*l.* a-piece for portions to his two younger sons that were not provided for by Mr. *Turgis*'s will; so that in effect Sir *George* had the management and disposal of this estate in the same manner, as he would have had, if the estate had been his own and given to himself in fee.

[185]

Lord Chancellor: If this estate had continued in the sons of Sir *George*, I would not have compelled them to convey a moiety to the plaintiff *Beckley* according to the articles, there being no writing to manifest the trust, as the statute of frauds and perjuries requires; but if the sons should convey the estate left them by Mr. *Turgis*, to their father Sir *George* without any consideration, then I think I may justly decree, that Sir *George Newland* the father should convey a moiety of the premises to the plaintiff *Beckley*, agreeable to the articles.

However, where one of the sons (as in the present case) has

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settled the premises left him by Mr. *Turgis*, on his own wife and the issue of the marriage, and such settlement is either previous to the marriage, or pursuant to the marriage articles, I cannot reach these lands which are now (as it were) in the hands of a purchaser.

But upon reading and considering the articles, by which it was agreed, that all legacies and sums of money, which should be given by the will of Mr. *Turgis* to either of them the said Sir *George Newland*, or the plaintiff *Beckley*, should be equally divided betwixt them, notwithstanding it was afterwards said, that all benefit or advantage accruing to either of them by the said will, should be also divided; yet it being here said, the same should be divided between them their respective *executors and administrators;* and forasmuch as, though there was some small parcel of land devised by the will of *Turgis* to Mr. *Beckley* and his heirs, yet as he did not offer by his bill, to divide this, his Lordship took it, that these articles did not extend to any part of the real estate devised by the testator *Turgis*.

[186] 3*dly*, It was observed, that though the testator *Turgis* had by his will devised all those lands to the sons of Sir *George Newland*, yet he had limited the premises to Sir *George Newland* himself, until the youngest of his sons should attain twenty-one, for and towards the maintenance of his said sons; from whence it was urged, that so much of the profits of these lands, as did exceed their maintenance, would be for the benefit of Sir *George*, and consequently should fall within the articles, and be divided between him and the plaintiff *Beckley*.

And there was proof that Sir *George Newland* took it so, and had declared the same to *Beckley;* and then notwithstanding it had been pretended, that this was only a trust for the sons of Sir *George Newland*, and that their father would be accountable to them for the surplus beyond what their maintenance would come to, yet it was hoped, that the Court would construe this to be a beneficial devise to Sir *George*, and that it could not be understood otherwise, since it enabled him out of this fund, to educate his own two sons, which of course he would have been obliged to have done, though no such estate had been left them.

But by *Lord Chancellor;* By the same reason that the articles are construed to extend only to money and personal estate, they shall not extend to this devise of the land to Sir *George Newland*, though but during the minority of the sons; for though the word [legacy] be usually taken for the bequest of a

personal thing and on the contrary a gift of land by will be commonly (and more properly) called a devise, yet the word [legacy] may, in an extensive sense, be understood to comprehend (1) any kind of estate, real as well as personal, left by the testator's will to any person. [187]

Nevertheless, in the present case, for the reasons aforesaid, decree only the personal estate given by *Turgis*'s will to either of them the said Sir *George Newland* or *Beckley*, to be equally divided.

Hereupon it being said, that Sir *George Newland* had died insolvent, and though it should be admitted that these articles would let in the plaintiff *Beckley* as a creditor by specialty, yet there would not be enough to pay him:

Lord Chancellor ordered, that (if as was suggested) any of the mortgages of the testator *Turgis* were yet standing out, and the property thereof unaltered, and in case it should appear that Sir *George Newland* had received more than his moiety of the testator *Turgis*'s personal estate, then the plaintiff *Beckley* should be let in to receive out of the said *Turgis*'s personal estate, or the subsisting mortgages, so much as to make up his receipts equal with those of Sir *George Newland*, before Sir *George*'s representatives should be admitted to receive any thing further. (2)

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(1) *Brady* v. *Cubitt*, Doug. 40. (2) Reg. Lib. A. 1722. fol. 419.

DAVIS *versus* GARDINER.

CASE 48.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 499. pl. 24. A will says in the beginning, "after testa- "tor's debts "and legacies "paid," and then the will gives several legacies and portions to the testator's daughters;

MR. *Gardiner* of *Pishobury* in *Hertfordshire* made his will, wherein he began thus: *as to my worldly estate I dispose of the same as follows, after my * debts and legacies paid;* then he gave several legacies; after which he bequeathed 1500*l.* a-piece to his five daughters, payable at twenty-one or marriage, if with consent of his executors; and then followed these words, *after all my legacies paid, I give the residue of my personal estate to my son,* (having one only son); then he devised his fee-simple lands to his son and his heirs, and if his son should die without issue in the life-time of any of his daughters, he

and then says that "after legacies paid," the surplus of the personal estate shall go to the son. After which follows a devise of land to the son; but if he dies without issue in the life of any of the daughters, then to the daughters. There is out of the personal estate a sufficiency to pay great part, though not all of the legacies: in such case the deficiency is not chargeable upon the land. [* 188]

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devised his real estate to his daughters, to whom he ordered interest to be paid at 5*l.* per cent. by his executors for their portions, until the same should become due, and appointed his son, and one *Serle*, executors.

The personal estate was not sufficient to pay all the portions, but was enough to pay much the greatest part of them.

Upon which it was objected, that the real estate ought to be charged therewith, because by the words of the will, his debts and legacies were to be paid, and the devise to the son of the lands in fee followed afterwards.

That portions for children ought to be favoured; and if the words would bear a construction whereby these portions might be charged on the land (as they would well do in the present case) they ought to be taken in that sense.

Lord Chancellor: As plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate of an heir; for a charge, so far as the value of it amounts, is, *pro tanto*, a disinherison.

[189] In the present case, as to the expression *after my debts and legacies paid I dispose of the same as follows*, &c. the word [legacy] is there improper, in regard the disposition in the words that immediately follow is of several legacies; so that it says, *after my legacies are all paid*, I will then that my legacies shall be paid, which is absurd.

The testator in saying by his will, that after all his legacies paid the residue of his personal estate should go to his son, shews, that he had no apprehension but that there would be a surplus of his personal estate; and consequently could not think of charging his land with his legacies, or that there would be the least occasion for it. And though every one *primâ facie* is supposed to know what he himself is worth, that presumption will not hold in the present case, it appearing that the testator was therein mistaken. I admit the portions might be charged on the real estate, had the devise of the land been to the son in fee absolutely, for without such construction the devise would have been void, and the son would have taken the land by descent; so that the will must, in such case, have signified nothing as to the land, unless it were to operate, so as to charge the land with the legacies and to intimate that the heir was not to take until after the legacies paid. But,

Here the will devises the land to the son and his heirs, and if the son die without issue in the life-time of any of the daughters then to the daughters, so that the son is not named in the

will only for the benefit of the daughters; and it is no more than if the testator had said, I give my lands to my daughters and their heirs, if my son dies without issue living the daughters or any of them.

It is also material, that the interest of the daughters' portions is ordered to be paid by the executors without mentioning the heir; besides here is not such a deficiency of the personal assets, as to leave the daughters destitute. [190]

For which reason the Court decreed the real estate not liable. (1)

Note: If in the preceding case there had been a want of assets for the payment of the testator's debts, it seems the lands would have been charged therewith by virtue of the words, *after my debts and legacies paid, I give,* &c. (2)

So if the testator had owed a debt, for which his real and leasehold estates were mortgaged, equity would in this case have charged all this debt on the real estate, in order to have enlarged the fund for the payment of the (3) legacies as well as debts.

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(1) Reg. Lib. A. 1722. fol. 343.

(2) But although the Court may have expressed itself more strongly in the case of creditors than of legatees, it seems, that no *rule* of construction has been adopted in the one case which does not apply to the other, and that the real estate has been charged with *legacies* by words not stronger than those made use of in the present case. —Vide *Clowdsley* v. *Pelham,* 1 Vern. 411. *Alcock* v. *Sparhawk,* 2 Vern. 228. *Bowdler* v. *Smith,* Pre. Cha. 264. *Harris* v. *Ingledew,* post. 3 vol. 95. *Legh* v. *Earl of Warrington,* 4 Bro. P. C. 90. *Hatton* v. *Nicholl,* Ca. temp. Tal. 110. *Lypet* v. *Carter,* 1 Vez. 499. *Earl of Godolphin* v. *Penneck,* 2 Vez. 271. *Thomas* v. *Britnell,* 2 Vez. 313. (*z*)

(3) Vide, *Oneal* v. *Mead,* ante, 1 vol. 693. *Rider* v. *Wager,* post. 335.

(*z*) See also *Kightley* v. *Kightley,* 2 Ves. jun. 328. *Williams* v. *Chitty,* 3 Ves. 545. *Shallcross* v. *Finden,* 3 Ves. 738. *Keeling* v. *Brown,* 5 Ves. 359. *Austen* v. *Halsey,* 6 Ves. 475. *Brydges* v. *Phillips,* 6 Ves. 571. *Bootle* v. *Blundell,* 1 Mer. 233. *Bench* v. *Biles,* 4 Madd. 187.

TERM. S. MICHAELIS, 1723.

CASE 49.

HOBSON *versus* TREVOR.

Lord MACCLESFIELD. 10 Mod. 507. 1 Stra. 533. 2 Eq. Ca. Ab. 21. pl. 18. An agreement in marriage-articles to convey to the husband a third part of what shall come to the father of the wife on the death of his father; this good and equity will compel an execution.

THE plaintiff *Hobson* was a younger son to Lady *Hobson*, and put apprentice to a linen-draper, and under age; the defendant *Trevor* was the eldest son of Sir *John Trevor* late Master of the Rolls, but had incurred his displeasure and was not admitted to his presence, and it was uncertain whether he would inherit any part of his estate.

1. Mo. Rep. 689. 2. ——— . 539. The defendant Mr. *Trevor* encouraged the plaintiff *Hobson* to court his daughter without the privity of Lady *Hobson* the plaintiff's mother, and the defendant *Trevor* before the marriage, gave a bond to the plaintiff *Hobson* dated 8 *Nov.* 1716, in the penalty of 5000*l.* and in the condition the then intended marriage betwixt the said plaintiff and the defendant's daughter was recited, and that the defendant had agreed, in consideration of the said intended marriage, to settle and assure one third part of all such real estate, as should descend

[192] or come to him the said *Trevor* by and upon the decease of his said father the Master of the Rolls, to the use of the plaintiff *Richard Hobson* for life, remainder to the use of *Elizabeth* the defendant's daughter for her life, remainder to the heirs of the body of the said *Elizabeth* by the said plaintiff *Hobson*, the remainder to the right heirs of the said defendant *Trevor*, after which came these words, [now the condition of the obligation is, that if the said marriage shall take effect, and the said *Edward Trevor*, shall within three months after the death of his said father, settle and assure one third of all such real estate as shall descend or come to him after his father's death, then the bond to be void.]

The marriage took effect; and soon after Sir *John Trevor* dying intestate, whereby a great real estate came to the defendant as eldest son and heir of his father, the plaintiff and

his wife brought their bill for a specific performance of this agreement.

Objected, The plaintiff shall have no more than the penalty of 5000*l.* and it is a dangerous precedent to suffer an heir apparent to enter into any agreement to dispose of his father's estate (1) before he has it; besides the plaintiff in this case makes no settlement, and it is in the discretion of a court of equity, whether they will execute this or any agreement that is brought before them.

But by *Lord Chancellor;* this is an agreement made upon a valuable consideration, that of the marriage of a child, and therefore fit to be executed in equity. And

It seems the more reasonable, in regard it extends to no more than a third part of the real estate that was to come to the defendant from his father, and this was very hazardous; [193] for if the defendant *Trevor* had died in the life-time of his father, or if there had been a will, the defendant, who was so well known to be under the displeasure of his father, had but an indifferent prospect, so that it might be reasonably thought that the plaintiff at the time, had the worst of the bargain.

As to the plaintiff's making no settlement, it appears he was an infant and the defendant knew him to be so, and consequently that he could at that time make no settlement; probably the plaintiff depended upon his success in trade, as he had been an apprentice to a linen-draper and was left a portion of upwards of 1000*l.* by his father.

Then it can be no argument to say, that the defendant ought only to pay the penalty of 5000*l.* because the agreement is recited in the bond, and such agreement was not to be the weaker but the stronger for the penalty (*y*); and by the same reason, that had the penalty been higher and beyond the value of a

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(1) Vide *Wright* v. *Wright*, 1 Vez. 409. *Whitfield* v. *Fausset*, 1 Vez. 391. (*z*)

(*z*) *Twisleton* v. *Griffith*, ante, 1 vol. 310. and cases there collected. The authority of the principal case, and of *Beckley* v. *Newland*, ante, 182, has been doubted by Lord *Eldon; Harwood* v. *Tooke*, 1 Madd. Princ. Chan. 437. (Ed. 1815.) And see *Carleton* v. *Leighton*, 3 Mer. 667.

(*y*) So *Cannel* v. *Buckle*, post. 243. *Moorecroft* v. *Dowding*, post. 314. *Anon.* Mose. 37. *Howard* v. *Hopkyns*, 2 Atk. 371. *Hardy* v. *Martin*, 1 Cox, 26. *Prebble* v. *Boghurst*, 1 Swan. 318. Unless it appears to have been the intention of the parties that the obligor should have the option of doing the act agreed to be done, or paying the penalty. *Woodward* v. *Gyles*, 2 Vern. 119. *Chilliner* v. *Chilliner*, 2 Vez. 528. *Street* v. *Rigby*, 6 Ves. 818. *Magrane* v. *Archbold*, 1 Dow, 107.

HOBSON *v.* TREVOR.

third part of the real estate, in such case the defendant would not have been bound to pay it, so now the penalty being beneath the value of a third part of the real estate, the plaintiff is not bound to accept it; besides, it is to be a settlement for the benefit of the issue of the marriage, and the payment of the 5000*l.* to the husband would not answer the end, nor provide for such issue.

Wherefore let the agreement be executed *in specie;* saving that a third part of the real estate, which came to the defendant from his father Sir *John Trevor*, must be settled upon the plaintiff *Hobson* and his wife for their lives, remainder to their
[194] first, &c. sons in tail male, remainder to their daughters in tail general, remainder to the defendant *Trevor* in fee; and let the defendant account to the plaintiff for the mesne profits from the end of three months after his father's death, and be examined upon interrogatories touching his father's real estate, and produce all books, papers and writings upon oath, and pay costs.

1. Rus. Ves. 648.
3. Sim. 234.

CASE 50.

NEWLAND *versus* SHEPHARD.

Lord MACCLESFIELD.

9 Mod. 57.
2 Eq. Ca. Ab. 329. pl. 4.
J. S. after the devise of several parts of his real and personal estates to several persons, devises the interest and produce of the surplus of his real and personal estate to his grandchildren until their age of twenty-one, this will pass the absolute right and property of the real and personal estate to the grandchildren after that age.

MR. *Shephard* a druggist having a daughter an only child, to whom he gave 7000*l.* portion, and married to the plaintiff *Newland*, eldest son of Sir *George Newland*, and Mr. *Newland* having issue by her three children, Mr. *Shephard* made his will, by which having disposed of some part of his real estate, and of some legacies, he devised the residue of his real and personal estate unto trustees, their heirs, executors and administrators in trust, to pay and apply the produce and (1) interest thereof for the maintenance and benefit of such of his grandchildren by his said daughter *Newland* as should be living at the time of his decease, until his said grandchildren should come to the age of twenty-one years, or be married; and he went no further, nor made any other disposition of his estate, only directed, that if all his trustees should die, in such case his son-in-law *Newland* should be a trustee.

Obj. The surplus of this real and personal estate, being un-

(1) The word "*produce*" is not made use of in the case as stated by Reg. Lib. B. 1723. fol. 88. although part of the Lord Chancellor's argument, appears by this report, to have turned particularly upon it.

disposed of by the will, ought after the grandchildren should have attained their age of twenty-one, to go in the same manner as if there had been no will; and consequently the real estate must descend to the heir at law of the testator, and the personal estate be distributed amongst the next of kin, according to the statute of distribution; and though the testator's intention might have been, nay (probably) was otherwise, yet there must be words, as well as an intention, to pass away any estate, especially with regard to a real estate.

[195]

Lord Chancellor: The intention is most plain that the grandchildren should have the surplus both of the real and personal estate, after their age of twenty-one; it is true there is a provision for the children by the marriage settlement, but that is not to take place until after their father's death.

In this case the testator *Shephard* did not care to trust his son-in-law with providing for his children out of his own estate, not only during the time when their maintenance would be least expensive, (during their tender years, and when every parent is bound to provide for his children,) but even here he takes a care which seems unnecessary, and can it be imagined, that the testator would shew a concern for his grandchildren when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it, (viz.) as soon as they should come of age and be marriageable? besides, it is plain the testator gives all from the heir at law by vesting the whole estate in fee, as well as the legal property of the personal estate, in trustees, which would not have been done had any thing been intended to remain to the daughter and heir (*z*); not only the interest, but the produce of the real and personal estate is to be applied by such trustees; and to help this plain intention of the testator, the word [produce] shall be taken in the larger sense, and then it will signify whatever the estate will yield by sale or otherwise.

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And this case is the stronger, in regard the son-in-law the plaintiff *Newland* is to be a trustee in case the other trustees shall all die, but it cannot be intended that the plaintiff *Newland* is to be a trustee for himself, or for what himself would be entitled to should it come to his wife. (*y*)

(*z*) But though the whole legal estate in fee is given to trustees, yet if any part of the beneficial interest is undisposed of, the heir shall have it by way of resulting trust. *Tregonwell* v. *Sydenham*, 3 Dow, 210. And see *Nash* v. *Smith*, 17 Ves. 29. *Kellett* v. *Kellett*, 1 Ba. & Be. 533, 3 Dow, 248. *King* v. *Denison*, 1 V. & B. 260. *Maugham* v. *Mason*, ib. 410. *Southouse* v. *Bate*, 2 V. & B. 396. *Dunnage* v. *White*, 1 Jac. & W. 583.

(*y*) But see *Bennet* v. *Davis*, post. 318. *Pawlet* v. *Delaval*, 2 Vez. 665.

NEWLAND *v.* SHEPHARD. (*a*) Cited in the case of Hewit versus Ireland. Vol. I. 427.

The case cited (*a*) in *King* and *Melling*, 1 *Vent.* 230. is applicable to the present case, where the Court construed a will against the express words, in order to make it take effect according to the intention, (viz.) a man devised an estate to his eldest son and the heirs of his body, and if he died living his mother, remainder to the second son, and because it could not be supposed that the father intended to prefer his second son before the issue of the eldest where the eldest had died in the life of the mother leaving a son, the Court adjudged the issue of such eldest son to take, and understood the devise, as if it had been, if the eldest son should die without issue living the mother, remainder to the second son. (1)

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(1) Et vide *Kentish* v. *Newman*, ante, 1 vol. 234. *Targus* v. *Puget*, 2 Vez. 194. *Peat* v. *Powell*, Amb. 387. (*x*) *White* v. *Barber*, Amb. 701. (*w*) But in *Fonereau* v. *Fonereau*, 3 Atk. 316. Lord *Hardwicke* expresses his disapprobation of this case of *Newland* v. *Shephard*. (*v*)

(*x*) S. C. 1 Eden, 479.
(*w*) S. C. 5 Burr. 2703.
(*v*) And see *Molesworth* v. *Molesworth*, 1 Cox, 75.

CASE 51.

HYDE *versus* SKINNER.

Lord MACCLESFIELD. Lessor covenanted to renew the lease at the request of the lessee within the term; lessee did not request, but executors do within the term; lessor is compellable to renew.

SKINNER possessed of a long term for years of a house in *Enfield* with the appurtenances, leased the same to the plaintiff's testator *Hyde* for five years, and covenanted for himself and his executors, to renew the lease at the same rent and on the same covenants upon the request of *Hyde* within the term. *Hyde* the lessee died within the term, having laid out a considerable sum of money in improving the premises, and the executors within the term requested the defendant the lessor to make a new lease to them for fifty years at the old rent.

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Obj. This request ought to have been made by the lessee *Hyde* and not by his executors, who may be insolvent persons, and consequently the lessor in danger of losing his rent.

Lord Chancellor: The executors of every person are implied in himself, and bound without naming; and the meaning of this covenant was to the end the lessee might be reimbursed the money which he had laid out in the improvement of the premises, for which reason it is immaterial whether the testator or

the executors required the renewal of the lease, it need not be personal.

But then the request for the making of a new lease for fifty years is too much; for it might have been as well for 100 or 200 years; but the usual term for leasing being for twenty-one years, let the defendant demise the premises to the plaintiff for twenty-one years, or for any lesser term as the plaintiff shall elect.

And though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewing this new lease, forasmuch as then the lease would never be at an end. (1)

As to the objection, that the executors might be insolvent tenants, and such as the defendant would not care to trust; to this it may be answered, that there is to be a clause of re-entry in the lease, and the value of the premises being doubled by the improvements of the original lessee, such clause of re-entry will secure the landlord against any insolvency of the tenant.

Therefore let the defendant pay costs in this Court, and also at law for the ejectment which he brought against the plaintiff, and in which he has recovered judgment. (2)

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(1) Vide *Bridges* v. *Hitchcock*, 1 Bro. P. C. 522. *Furnival* v. *Crew*, 3 Atk. 83. *Russel* v. *Darwin*, 2 Bro. C. C. 639. (note.) *Cooke* v. *Booth*, Cowp. 819. *Tritton* v. *Foote*, 2 Bro. C. C. 636. (*z*)

(2) Reg. Lib. A. 1723. fol. 170.

(*z*) S. C. 2 Cox, 174. *Redshaw* v. *Governor, &c. of Bedford Level*, 1 Eden, 346. *Baynham* v. *Guy's Hospital*, 3 Ves. 295. *Moore* v. *Foley*, 6 Ves. 232. *Iggulden* v. *May*, 9 Ves. 325, 7 East, 237, 2 N. R. 449. *Harnett* v. *Yielding*, 2 Sch. & L. 549. *City of London* v. *Mitford*, 14 Ves. 41. *Watson* v. *Hensworth Hospital*, ib. 324. *Willan* v. *Willan*, 16 Ves. 84. *Dowling* v. *Mill*, 1 Madd. 541.

6. Sim. 167.

MARLOW *versus* SMITH.

CASE 52.

SIR *Charles Pitfield* seised in fee of the manor of *Hoxton* near *Shoreditch* in *Middlesex* on the marriage of his son *Alexander* with *Elizabeth Waller*, by indentures of lease and release dated

2 Eq. Ca. Ab. 328. pl. 3. One makes his will, and says, "As to "such estate "as God hath blessed me with, I devise in manner following;" after which he gives part to J. S. and his heirs, &c. and devises the rest of his estate to his wife in fee: this passes a trust-estate.

MARLOW *v.* SMITH.

the 14th and 15th of *April* 1680, conveyed the said manor of *Hoxton* to trustees Sir *John Buckworth* and *Francis Moore* and their heirs, to the use of the said Sir *Charles Pitfield* for life, remainder to the use of his son the said *Alexander Pitfield* for ninety-nine years, (if he should so long live,) remainder to the use of the said trustees and their heirs during the life of *Alexander Pitfield*, in trust to preserve contingent remainders, remainder to the use of the first, &c. son of *Alexander Pitfield* by the said *Elizabeth* in tail male successively, remainder to trustees for 500 years to raise portions for daughters of the marriage, remainder to the use of the heirs of the body of the said *Alexander Pitfield*, (who is still living,) remainder to the use of the right heirs of Sir *Charles Pitfield*.

Sir *Charles* died; *Alexander Pitfield* had issue *Charles Pitfield*, who taking ill courses runs in debt, and endeavouring to sell this estate in his father's life-time, prevailed with the heir of *Moore* the surviving trustee for supporting contingent remainders, to join in a deed of bargain and sale enrolled, for the making a tenant to the *præcipe;* and a recovery was suffered to the use of *Charles Pitfiel* in fee, who devised all his estate to trustees to pay his debts.

[199] But it happened that *Francis Moore* the surviving trustee had by his will devised in manner following, "As to such estate "as the Lord had bestowed upon him he devised part to *J. S.* "and his heirs, and all the rest of his real estate he devised to "his wife and her heirs."

Charles Pitfield died leaving an infant son, and *Alexander Pitfield* had issue one daughter.

Upon a bill brought by the creditors of this *Charles Pitfield*, it was decreed, that this reversion of *Hoxton* should be sold before the Master to the best purchaser, for payment of the debts of *Charles*, and Mr. *Swinfen* was allowed the best purchaser at a *South-sea* price, in trust for Serjeant *Mead*, who deposited 500*l.* part of the purchase-money.

Whereupon it being referred to a Master to state the title, the only question was, whether the will of *Moore* the surviving trustee in the settlement for preserving contingent remainders, did pass his interest in the premises, being a freehold descendible and made devisable by the statute of frauds? for that if the will of *Moore* passed this estate, then the joining of his heir would not make a tenant to the *præcipe*, and so the recovery was void, the consequence of which would be, that the purchaser having no title made him, must be discharged from the purchase and have back his deposit.

For the creditors it was insisted, that when *Moore* the testator devised all the rest of his estate, he must be intended to have meant *his own estate,* and not an estate of which he was but a *bare trustee;* for such estate was really, truly and in [200] equity the estate of the *cestui que trust;* and this construction appeared to be the more reasonable, from the words which the testator had used in his will, (viz.) "As to such estate as the "Lord had bestowed upon me," for they must be supposed to have been made use of with an eye to such estate of which the testator was to have the *benefit:* now he was to be never the better for the trust-estate, nor to have any advantage therefrom.

That if an executor should grant *omnia bona sua,* this would not pass the goods which he has as executor, especially if at the same time such executor had any goods in his own right; from all which it followed, that the devise would not pass the trust-estate.

On the other side it was said, that *Moore*'s devise of all his lands, passed these lands of which he was but a trustee; for in law they were *his* lands; and it is at law that the operation of this will must be determined; at law he was the only person who could recover them.

That if the testator had by his will devised all the land of which *he was seised,* it must undoubtedly have passed these lands; for it was most plain the testator was the person seised thereof.

That had the testator been attainted or outlawed for treason or felony, he would have *forfeited* these lands; so that if the lands in question were the testator's lands to forfeit, they were consequently his lands to grant or devise, for *forisfacere est alienum facere;* and that in this case there was a manifest diversity betwixt an estate which a trustee has in trust, and the interest which an executor or an administrator has in goods as [201] executor or administrator; for if an executor or administrator be attainted of treason or felony, the goods which he has as executor or administrator would not be thereby forfeited; whereas the lands which a man is seised of as trustee would in such case be forfeited.

But if there was the least doubt of the title, (which it was made to appear there was by the opinion of Serjeant *Hooper* and Mr. *Webb,*) it would by no means be proper for the Court of Chancery to compel the party to accept the title; for in such case, if the purchaser should be sued, where could he have recourse to for redress? and here the Court was compelling the party to purchase a special verdict or a suit.

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The Court will not compel a purchaser under a decree to accept a doubtful title. (*z*)

Master of the Rolls: Though this be a trust-estate, yet the legal estate being in the devisor in the eye of the law, it is *his* estate and *his* property, and therefore passes by the devise of his estate; and if he had devised *all the land which he had been seised of*, these lands would certainly have passed (*y*): neither can there be any inconvenience in such construction; for as the testator himself was a trustee, so shall his devisee also be a trustee to preserve these remainders; and there being the opinion of learned men against the title, (viz.) that the will of the testator did pass this trust-estate, I will not, nor do I think it reasonable that a court of equity should compel the purchaser to accept the purchase; and therefore he must have back his deposit.

Note; In this case Mr. *Talbot* insisted, that though, when all the remainders were vested remainders in tail, the trustees might join in making a tenant to the *præcipe* in order to the

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suffering a recovery, yet if any remainder was in contingency, the trustees who were appointed to preserve all the contingent remainders, ought not to join in suffering a recovery to bar any such remainders; if they did, it would be a breach of trust.

That accordingly in the principal case, the remainder to the use of the heirs of the body of *Alexander Pitfield*, (who was still living) being a contingent remainder, and the said *Alexander* having issue a daughter, if the infant son of *Charles Pitfield* should die without issue in the life of *Alexander*, *Alexander*'s daughter might be heir of his body, and if this should be a breach of trust in the heir of the trustee, the purchaser having notice of such trust might be liable to the same, and then for this reason also it could not be a good title. (1)

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(1) Vide *Mansell* v. *Mansell*, post. 678.

(*z*) See *Colton* v. *Wilson*, post. 3 vol. 190.

(*y*) It is now settled, though there has been some doubt upon the subject, (*Duke of Leeds* v. *Munday*, 3 Ves. 348. *Ex parte Sergison*, 4 Ves. 147. *Attorney-General* v. *Buller*, 5 Ves. 339. *Ex parte Brettell*, 6 Ves. 577.) that trust estates pass by a general devise, unless a contrary intention can be collected from the will. *Roe* v. *Reade*, 8 T. R. 118. *Lord Braybrooke* v. *Inskip*, 8 Ves. 417. *Ex parte Morgan*, 10 Ves. 101.

MR. CLAVERING'S Case.

CASE 53.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 726. pl. 1. Court tender of discharging a supplicavit.

UPON a motion for a *supplicavit* at the suit of Mr. *Gray* of *Newcastle* barrister at law, upon articles filed on oath of assault and battery against Mr. *Clavering*, and that he went in fear of his life,

Lord Chancellor granted the writ, which commanded the party complained of to find sureties for the peace for a twelvemonth, and ordered it to be indorsed for 4000*l.* which the party and his sureties should be bound in.

7. Sim. 542.

Afterwards Mr. Solicitor General and Mr. *Mead* moved to discharge this order, or at least to lessen the sum, Mr. *Clavering* being only tenant for life of his estate, and mentioned the statute (*a*) which gives costs in case of a groundless and vexatious complaint of this nature.

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(*a*) 21 Jac. I. cap. 8.

Lord Chancellor: I will not discharge the order, for then Mr. *Clavering* may kill the man; the Court interposes in this case to prevent mischief and to save life, and it is an order of course; if the party complains of vexation, he comes too soon, let him stay till the year is out, and behave himself quietly all that time; it seems that Mr. *Clavering* is a man of a turbulent and dangerous spirit, that his friends or neighbours are afraid to be bound for his quiet behaviour, and if the sum be too great for his circumstances, there ought to be an affidavit to prove this inability. (*z*)

Wherefore deny the motion. (1)

It seems the Master of the Rolls generally refuses to grant this writ, directing the party grieved to apply elsewhere, (viz.) to the justices of the peace.

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(1) So, *King* v. *King*, 2 Vez. 578.

(*z*) *Ex parte Lewis*, Mose. 191. *Ex parte Gibson*, Mose. 198. And see *Ex parte Grosvenor*, post. 3 vol. 103. *Snelling* v. *Flatman*, Dick. 6. *Heyn's Case*, 2 V. & B. 182. *Dobbyn's Case*, 3 V. & B. 183. *Tunnicliff's Case*, 1 Jac. & W. 348.

CLARKSON *versus* HANWAY & al'.

CASE 54.

At the Rolls. 2 Eq. Ca. Ab. 482. pl. 22. 510. pl. 2.

THE bill was brought by the plaintiff a pauper, to set aside a conveyance made by *Simon Hanway* the plaintiff's kinsman

A conveyance by a weak man for a small consideration set aside.

CLARKSON *v.* HANWAY.

(and to whom the plaintiff was heir at law) to the defendants *Jonas Hanway* and *Box* and their heirs.

The conveyance was by indentures of lease and release dated 20 and 21 *March* 1717, in consideration of an annuity of 20*l.* a year to be paid to the said *Simon Hanway* for his life, and a fine was levied to the uses of the deed.

[204] And by another deed dated 22 *March* 1717, between the defendants *Box* and *Hanway* of the one part and *Simon Hanway* on the other part, reciting that 20*l.* a year for the life of *Simon Hanway* was to be secured to *Simon* as the consideration of the conveyance, the defendants *Box* and *Hanway* severally covenanted for the payment of this 20*l.* a year to the said *Simon.*

In *September* 1719, being two years after the conveyance, *Simon Hanway* died aged seventy-four, and consequently was seventy-two years old when he bought this annuity.

Objected for the defendants, that *Jonas Hanway* was a kinsman of the grantor *Simon* and of his own name, and the grantor had often declared he would rather that his kinsman the defendant *Hanway* should have the estate for this annuity, than any other person for a more valuable consideration, and that he was willing to give the premises to his kinsman.

A different consideration from what is expressed in the deed not to be averred; and though the consideration of blood be a good consideration, yet that not to be regarded, if money or the grant of an annuity be expressed in the deed. Also a good objection, that the grant is to two, and only one of kin.

Master of the Rolls: Here is proof that *Simon Hanway* was a weak man and easily to be imposed upon. And though the name and blood had been a sufficient consideration for granting the premises to the defendant *Hanway,* yet the deed itself, and the deed of covenants dated after the conveyance to the defendant, and likewise the answer, all put the defence on another foot, making the 20*l.* per annum to be the sole consideration for the purchase; and indeed the consideration of blood could not be the inducement for * the conveyance, because the defendant *Box,* though no relation, was thereby to have a moiety of the estate; and it would be of mischievous consequence, and liable to the danger of perjury, which the statute of frauds intended to prevent, to suffer parol evidence, to prove blood and kindred to have been the consideration of this conveyance. (*z*)

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(*z*) The general rule upon this point is, that where no consideration is expressed in a deed, a party may aver and prove considerations in support of it; and where a consideration is expressed, a party may still aver other considerations not inconsistent therewith. *Mildmay's Case,* 1 Rep. 176. *Villers* v. *Beamont,* Dyer, 146. *Bedell's Case,* 7 Rep. 39. b. *Vernon's Case,* 4 Rep. 3. *Goodtitle* v. *Petto,* Str. 934. *Peacock* v. *Monk,* 1 Vez. 127. *Roe* v. *Tranmarr,* Willes, 682, 2 Wils. 75. *Chapman* v. *Emery,* Cowp. 278. *Rex*

CLARKSON *v.* HANWAY.

All which more particularly appears from the contradiction of this parol evidence, for part of it says, that *Simon Hanway* declared he would give this estate to the defendant *Hanway*, at the same time another part of the same evidence tends to prove, that the said *Simon* sold it him in consideration of the annuity.

Evidence of fraud, when no proof that any instructions were given by the grantor, or when the deed was not read to the grantor.

Neither has there been the least evidence read of any instructions given by *Simon Hanway* to the drawer of the deed for the preparing thereof, though the man has been examined who drew the same. On the contrary it is confirmed, even by the answer, that the defendant *Jonas Hanway* alone gave instructions for the preparing of the deed; nor does it appear that at the time of executing the deed it was read over to *Simon Hanway*.

Taking it then, (as is admitted by part of the answer,) that *Simon Hanway* intended to sell this estate, it seems clearly to be a very weak bargain, to sell an inheritance of 40*l.* per annum for an annuity of 20*l.* per annum and this annuity secured by a covenant only, instead of a mortgage of the same estate; and this to a person at that time seventy-two years old, and who had not the deed itself in his hands.

All this is fraud apparent; and judging upon the face of a deed is judging upon evidence which cannot err; whereas the testimony of witnesses may be false. [206]

Therefore let the defendants *Box* and *Hanway* re-convey the estate, and deliver up the writings, and pay back the rents which they have received from the premises, beyond what they have paid for the annuity, and let them do this in a reasonable time; within a month, or else to pay costs.

This decree was affirmed on an appeal to Lord Chancellor *Macclesfield*. (1)

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(1) *White* v. *Small*, 2 Cha. Ca. 103. *Bennet* v. *Vade*, 2 Atk. 324. *Evans* v. *Blood*, 4 Bro. P. C. 557. *Bridgeman* v. *Green*, 2 Vez. 627. (*z*) *Filmer* v. *Gott*, 7 Bro. P. C. 70. are cases of the same nature. (*y*)

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v. *Scammonden*, 3 T. R. 474. *Shove* v. *Pincke*, 5 T. R. 124. *Hartopp* v. *Hartopp*, 17 Ves. 192. But where, as in the principal case, the consideration expressed in a deed is impeached on the ground of fraud, the party claiming under the deed cannot aver in its support considerations different from that expressed. *Bridgman* v. *Green*, 2 Vez. 627. *Watt* v. *Grove*, 2 Sch. & L. 501. *Willan* v. *Willan*, 2 Dow, 282.

(*z*) S. C. Wilmot, 58.

(*y*) *Webb* v. *St. Lawrence*, 5 Bro. P. C. 30. *Nantes* v. *Corrock*, 9 Ves. 182. *Huguenin* v. *Basely*, 14 Ves. 273. *Willan* v. *Willan*, 16 Ves. 72, 2 Dow, 282. *Watt* v. *Grove*, 2 Sch. & L. 501. *Aylward* v. *Kearney*, 2 Ba. & Be. 463. *Whalley* v. *Whalley*, 1 Mer. 436. *Griffiths* v. *Robins*, 3 Madd. 191.

TERM. S. HILL. 1723.

CASE 55. CHILD *versus* HUDSON'S BAY COMPANY.

Lord MACCLESFIELD. Hudson's Bay Company, &c. may by their bye-laws make restrictions upon their stock, (viz.) that it shall first be liable to pay the debts due to themselves from their own members, or to answer the calls of the company upon the stock.

SIR *Stephen Evans* was one of the proprietors of the stock of the *Hudson's Bay Company*, which company are made a corporation by charter, and are thereby empowered to make bye-laws for the better government of the company, and for the management and direction of their trade to *Hudson's Bay*.

918.9.C.452.

Accordingly they made a bye-law, that if any of their members should be indebted to the company, his stock in the company should be in the first place liable to the debts which such member should owe the company; and that the company might seize and detain the said stock for the debts due to them.

One *J. S.* was intrusted to act for them upon a project of insurances on marriages and apprentices, (viz.) that on the husband's or apprentice's paying down such a sum to the said *J. S.* that then the said *J. S.* should pay so much to the widow of the said husband, in case she survived; or to the apprentice, if he should come out of his apprenticeship and set up a trade; and the said *J. S.* was only a servant of the company's who received in, and made orders to issue and pay out this money; and it was on this account, and in trust for the company, that Sir *Stephen Evans* was indebted to the said *J. S.*

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Afterwards, on Sir *Stephen Evans*'s becoming a bankrupt, the assignees under the commission brought a bill against the company, shewing that the said Sir *Stephen Evans* had 1500*l.* in their stock, and praying an account of the profits and dividends thereof.

The defendants the company insisted, that Sir *Stephen Evans* was indebted to *J. S.* their trustee in the sum of —— and that Sir *Stephen*'s stock ought to be liable to pay that debt.

Objected for the plaintiffs (by *Wearg* Solicitor General) that this bye-law of the company was void, (viz.) that the stock of the company should be liable to any one debt in preference to another: for that all debts ought to be paid according to course of law, and no bye-law could be made to the prejudice of a third person, who might be a creditor, so as to postpone him; that it was as if two co-partners, on their entering into co-partnership, should covenant that the stock of each partner should be first liable to the debts which he should owe to the other partner, before the debts which he should owe to any other person.

So a bye-law of a company to seize a member's stock for a debt due from a member to the company, is good; but if the debt be not due to the company but to their trustees, then the bye-law will not extend to it.

Lord Chancellor: This is a good bye-law; for the legal interest of all the stock is in the company, * who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions, or terms; and by the same reason, that this bye-law is objected to, the common bye-laws of companies, to deduct the calls out of the stocks of the members refusing to pay their calls, may be said to be void.

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As to the other part of the bye-law empowering the company to detain and seize the stock of such member, that is also good; but then there ought to be some act done by the company, to order or declare, that the stock of such member is seized for the debt due to the said company; but this being a bye-law, to the prejudice of other creditors, it shall be taken strictly, and not to extend to such debt as the member does not owe in law, but only in equity; and in the present case this is in law a debt due to *J. S.*

A company without any power by their charter may of course make bye-laws; but if they have a particular power to make bye-laws for the management of their trade, they cannot make bye-laws for carrying on projects foreign to the affairs of the company.

A corporation has an implied power to make bye-laws; but where the charter gives the company a power to make bye-laws, they can only make them in such cases, as they are enabled to do by the charter; for such power given by the charter implies a negative, that they shall not make bye-laws in any other cases.

Thus, where the company, in the principal case, have a power given them by the charter to make bye-laws for the management of their trade to *Hudson's Bay*, this power implies a negative, that they cannot make any other bye-laws (*z*); *a for-*

(*z*) See *Meliorucchi* v. *Royal Exchange Assurance Company*, 1 Eq. Abr. 8. pl. 8. *Rex* v. *Spencer*, 3 Burr. 1827. *Rex* v. *Ginever*, 6 T. R. 732. *Rex* v. *Tappenden*, 3 East, 186.

CHILD *v.* HUDSON'S BAY COMPANY. (*a*) Vide 6 Geo. 1 cap. 18.

tiori they cannot make bye-laws in relation to projects and insurances, which by (*a*) act of parliament are declared to be illegal. (*y*)

(*y*) If the insurances proposed by the Company were illegal under the st. 6 G. 1, they were so only as *projects;* for that act extends to none but *marine* insurances. The parts of the act which relate to *projects,* s. 18, 19, 20, have been repealed by st. 6 G. 4. c. 91.

CASE 56.

* DUKE OF RUTLAND & al' *versus* DUCHESS OF RUTLAND & al'.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 416. pl. 10. 440. pl. 41. One makes a will and an executor, and gives a legacy of 500*l.* to the executor, but makes no disposition of the surplus; parol evidence of the intention and declaration of the testator touching the surplus admitted.

LADY *Rachael Manners,* sister to the plaintiff the Duke of *Rutland,* having a portion left her by her father the late Duke, and being entitled to other money which in the whole amounted to about 10,000*l.* and was either secured by mortgages or charged upon land, made her will, in the beginning of which mentioning of what her estate consisted, and that she intended to dispose of the same by her will, she gave to every one of her brothers and sisters, and also to her half brothers and sisters, pecuniary legacies, particularly to her eldest brother the plaintiff the Duke 500*l.* after which she made no disposition of the surplus of her personal estate, but left the Duke sole executor.

[*210] There were three witnesses to the will, the Duchess of *Devonshire,* Mr. *Vernon* a clergyman, who drew the will, and one ——— a servant.

Mr. *Vernon* the witness said, that the testatrix the Lady *Rachael Manners* did not give any express instructions for leaving the surplus to the plaintiff the Duke; but that he understood and supposed, that his Grace was to have the surplus of her personal estate; and that for the reasons following, because she had made him sole executor, also for that when the testatrix had given several legacies, he asked her whether she would give more legacies, to which the testatrix replied, *No;* that then he (the witness) asking her, whom she would make executor, she replied, she would make the Duke her brother sole executor; and that she hoped his Grace would not take it ill,

[211] that she had given so much away from him; and that the next day afterwards the testatrix sent to the Duke, desiring him to take care of a legacy of 100*l.* which she had directed to be paid to the poor.

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The Duchess of *Devonshire* swore, that to the best of her remembrance, the testatrix being asked at the time of making the will, whether she intended that the surplus of her personal estate should go to the Duke her executor, answered, *Yes.*

The servant, who was the third subscribing witness, deposed, that the testatrix being asked who she designed should have the surplus of her personal estate, expressly answered, *the Duke her brother.*

To all which it was on the opening of the cause objected, that parol evidence relating to the declarations of the testatrix, who she intended should have the surplus of her personal estate, ought not to be read, in regard this would introduce all the mischief and inconvenience, which the statute of frauds and perjuries was made to prevent.

Sed per Cur': Let the evidence be read, and we will judge of it afterwards; and the said evidence being accordingly read, and after hearing counsel on both sides, *Lord Chancellor* proceeded to give his opinion as follows:

As I have several times (*a*) decreed it, so I think it grounded on the greatest reason and justice, that where there is an express legacy given to an executor, and no devise of the surplus, such surplus shall go * according to the statute of distribution to the next of kin. As to the executor's being entitled thereto, it might with equal reason be said, that where the spiritual court grants administration to a person, this shall entitle the administrator to the surplus after debts paid; whereas neither executor nor administrator have any legal interest in the personal estate, but are vested only with a legal power over it, just as every trustee has a legal power over his trust-estate.

(*a*) See the case of Farrington v. Knightley, vol. 1. 544. Generally speaking, if there be an express legacy to the executor, and no devise of the surplus, the executor shall not have the surplus; but the same shall be distributable according to the statute.

If an executor or administrator had any legal or beneficial interest in the personal estate, they would by consequence have a power of devising it by will; but it is plain they cannot devise it.

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Nay, it is demonstrable, that an executor has no legal interest; because when an executor dies intestate, whatever is his will go to his administrator; whereas all the personal estate of his testator will belong to the administrator *de bonis non, &c.* and not to the administrator of the executor.

Secus, If the executor be also a residuary legatee, which shews that whatever the executor has as executor, is only *jure alieno;* and it is no argument to say, that as when I make such a one my heir, I give him my real estate; so by the same reason, by making him executor, I give him my personal estate; for the heir is sued in the *debet & detinet;* but the suit against the

Duke of RUTLAND *v.* Duchess of RUTLAND.

executor must be in the *detinet* only; and the assets are said to be *bona testatoris*, and not *bona executoris;* and the appointing one executor, is only appointing him to (*a*) execute the will of the deceased.

(*a*) Vide the case of Farrington v. Knightly, vol. 1. 544.

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* The difficulty would be to maintain, that if one should make a man executor without either disposing of the surplus, or giving an express legacy to the executor, such executor should have the surplus.

But it having been held, that where no express legacy has been given to the executor, he will be entitled to the surplus; and on the other hand, that the having given a legacy to the executor implies he shall have *no more*, for that otherwise he would have *all and some;* I will not alter these resolutions.

Giving to the next of kin express legacies, even though it be to all the next of kin, will not exclude them from coming in for the surplus upon the statute of distribution; and there is still much less reason for it where the legacies to the next of kin are unequal.

It is very necessary that the rule of property should be known, fixed, and certain, that people may know which way to steer.

And it is true, that the Court has frequently shewn this favour to the executor, to allow parol evidence in proof of the intention of the testator, to rebut that equity which otherwise would be in favour of the next of kin. (1)

(*a*) 2 Vern. 252. & ante vol. 1. 116.

Thus in the case of Lady (*a*) *Gainsborough* versus Lord *Gainsborough*, where the testator directed the scrivener to give the surplus to the executrix, which the scrivener omitted to do, conceiving the same to be implied by making the wife executrix; this was a piece of obstinacy in the drawer of the will, for which the executrix ought not to suffer.

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But here the evidence is very strong, that the testatrix intended the surplus to the executor, and this is evidence of the declaration of the testatrix at the time of making the will.

It is material, that the testatrix, reciting her personal estate in the beginning of the will, declares her intention to dispose of it; which must be understood of her intention to dispose of the whole.

Also when the will-maker (Mr. *Vernon*) asked the testatrix, whether she would give any more legacies? she said *No;* and

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(1) Vide *Rachfield* v. *Careless*, ante, 158.

thereupon Mr. *Vernon* said, Who then will you make your executor? to which she replied, *My brother the Duke.*

Again, the testatrix declared, that she hoped her brother would not take it ill that she had given so much from him; which is an argument, that she thought the legacies which were given, were to the prejudice of her executor and not of her next of kin; as it would have been, were the next of kin to have the surplus.

The Duchess of *Devonshire*'s evidence is, that the testatrix declared the Duke should have the surplus.

Moreover the servant positively swears, that the testatrix declared the executor the Duke should have the surplus, which Mr. *Vernon* the will-maker might not mind, he being at that time otherwise employed (*videlicet*) in writing the will.

It is further material, that the testatrix sent to her executor and not to her next of kin, acquainting him, that she desired 100*l.* should be given out of her estate to the poor; which, though it be a void legacy, (because not in writing) yet is an evidence of her intention, or of her considering her executor as the only person concerned in the surplus; and therefore gave him notice of what she desired might be done. [215]

After all I own, that the allowing parol evidence is exceedingly dangerous and not to be done, in case of discourses at a different time from that of making the will. But yet abstractedly from that case, parol evidence has been admitted.

Thus 1*st*, In (*a*) *Cheney*'s case, where one had two sons of the same name, it was held necessary that parol evidence should be given to ascertain which of the sons was meant, else the will must have been void. (1)

(*a*) 5 Co. 68.

2*dly*, In the case of (*b*) *Litton* v. *Litton*, where Sir *William Litton* devised all his lands out of settlement, Lord *Cowper* allowed parol evidence to be read, though it is true (*c*) one of the judges who were assistants to him at that time, was of opinion against the reading it; in which case the fact was, that some lands were out of all settlements, some were in settlements, but the limitations were spent, and other lands were in settlement, but the reversion in fee was in the testator.

(*b*) Reports in Chan. part 3. folio edit. 90. 2 Vern. 621. & vide ante 136.

(*c*) Mr. Just. Tracy, as said in Vern. but by Reports in Chancery the judges appear to have been unanimous for reading it.

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(1) So, *Baylis* v. *Attorney-General*, 2 Atk. 239. *Ulrich* v. *Litchfield*, 2 Atk. 373. *Countess of Shelburne* v. *Earl of Inchiquin*, 1 Bro. C. C. 341. (*z*)

(*z*) And see *Beaumont* v. *Fell*, ante, 140.

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3*dly*, In (*d*) *Ball* and *Smith*'s case it was held, that where a wife was made executrix, and had an express * legacy given to her, she should nevertheless be entitled to the surplus, because, it was the case of a wife; and if a wife is to be so regarded, I take the principal case to be stronger, where the head of the family the Duke, who bears the honour of the family, is made executor, and who may be justly thought to be above the drudgery of being a bare executor, consequently I will rather suppose that something beneficial was intended him.

(*d*) 2 Vern. 675. Where the wife has been executrix, and at the same time has had an express legacy, yet she has under some circumstances been held entitled to the surplus; a fortiori where the executor bears the title or honour of the family.

And I am the rather induced to be of this opinion in regard the Duchess of *Rutland*, though she claims to be let in for an equal share with the rest of the defendants, yet being but a mother-in-law to the testatrix, if the surplus had been distributable, she as not being of the blood of the testatrix, could have claimed no part upon the statute of distribution.

In all which points Lord Chancellor was very clear. (1)

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(1) Reg. Lib. A. 1723, fol. 515.

TERM. PASCHÆ, 1724.

STENT *versus* BAILIS.

CASE 57.

At the Rolls.

2 Eq. Ca. Ab. 57. pl. 5. 689. pl. 10.

THE bill was to be relieved against a contract in writing for the sale of eleven shares of the Lustring Company at 58*l.* a share, with the 10*l.* per cent. which the company had called in, and which the defendant the seller had agreed to pay.

The articles of agreement were dated 10 *Aug.* 1720. and the money to be paid on the then next opening of the company's books, at which time the defendant was to transfer the shares to the plaintiff.

The scrivener drew the articles according to these instructions; but at the meeting of the parties in order to seal, the defendant the seller of the stock insisted that he would not sell, unless the plaintiff would agree to pay the purchase-money at all events at such a day certain, whether the books did then open or not; and the stock being then risen, the plaintiff consented to execute an indorsement on the articles to that purpose, which articles and indorsement were executed at the same time in a tavern.

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On the 20th of *August* a *scire facias* issued to repeal the patent granted to this company, and at the same time a proclamation was published to forbid proceeding in transfers, and an (*a*) act of parliament afterwards passed making it a *præmunire* to have any dealings with those bubbles. (*z*)

(*a*) 6 Geo. 1. cap. 18.

The company remitted the call of 10*l.* per cent. and in lieu thereof accepted 2*l.* per cent. but never afterwards opened their books, nor (as their own secretary deposed) were they ever likely to do so.

The defendant *Bailis* brought an action on the articles, to which the plaintiff had pleaded *non est factum*, and on a verdict for *Bailis* at law, *Stent* sued out a writ of error, and on bringing a bill in this Court, obtained an injunction.

(*z*) This part of the st. 6 G. 1. c. 18. is repealed by st. 6. G. 4. c. 91.

STENT *v.* BAILIS.

At the hearing of this cause, it was objected for the defendant,

1*st*, That though this was an hard case on the now plaintiff, yet that it had been likewise hard on the defendant, who was not a contriver of the project but a sufferer by it, having himself bought stocks at high rates.

2*dly*, That equity ought in such cases to stand neuter, and to let the hardship rest where the law had cast it, and at law the now defendant had a verdict.

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3*dly*, That it could not be pretended here was any fraud on the defendant's side, who from the time of the contract made, was a trustee for the buyer, at whose risk any accident which had fallen upon the stock from the time of the contract, must be; and that this was not unreasonable, since he would have been entitled to the benefit of it, had it rose in the price; and that though the books had been shut up for some time, yet it was impossible to know but that they might open again, and that in a little time.

4*thly*, As to the calls of 10*l*. per cent. to be paid by the buyer, though these were afterwards countermanded, and instead thereof 2*l*. per cent. had been accepted, this was said to be done in pursuance of orders and bye-laws made by the company, to which every purchaser and proprietor must submit; and all that the defendant *Bailis* was to sell, was his right, which, let it have been what it would, the plaintiff was to pay so much money for it; and if the act of parliament had made this matter criminal, or the dealing in it a *præmunire*, the now plaintiff might have taken advantage of it at law.

5*thly*, That if the money had happened to have been paid, surely equity would not have compelled it back again. And as equity would not perhaps have helped the defendant to the debt, had it turned out a losing bargain, so there was as little reason for it to interpose or deprive the defendant of the advantage which he had now gained at law by the verdict.

Against natural justice that any one should pay for a bargain which he cannot have.

Master of the Rolls: It is against natural justice, that any one should pay for a bargain which he cannot have; there ought to be *quid pro quo*, but in this case, the defendant has sold the plaintiff a *bubble* or *moonshine*.

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It is impossible that this bargain should ever be made good to the plaintiff, for here is proof, by the company's own secretary, of his having advised with three eminent counsel, who all agreed that the company cannot justify accepting any more transfers, and the money cannot be said to be due in conscience, supposing the plaintiff to be incapable of coming at what he

contracted for, and in consideration whereof he was to pay his money.

If I article to buy an house, and the house is burnt down before the day of payment, I am not bound to pay the money.

If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not (1) in equity be bound to pay for the house, and yet the house may be built up again; but I doubt it will be impossible to set up the company again, as in the other case the seller may do the house.

It is considerable, that the contract was made in 1720, which being near four years since, and the books having never been opened since, it is to be presumed they never will.

As to the objection, that the plaintiff here might have defended himself at law, he was *particeps criminis*, and therefore could not (I doubt) have taken advantage of the statute; besides, matters of fraud are cognizable (*a*) in equity, as well as at law. The original contract was to pay the purchase-money upon the transfer, both which were to be made *simul & semel;* and the meaning of the indorsement is no more, than that if the books should not open on the very day that was appointed for that purpose, the now plaintiff would not insist upon the precise time, but would pay the money.

(*a*) Ante 154, Colt versus Woollaston & Arnold.

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But still he must be supposed to have been under an expectation, that in a reasonable time the books would open, and a transfer be made to him; certainly it cannot be imagined, that the plaintiff would ever have been prevailed upon to covenant for the payment of the money at a precise day, had he entertained the least apprehension, that the books would never have opened. The seller in this case is the chief actor, he went to market with the bubble; and since no transfer can be made, let there be a perpetual injunction, and let the defendant at the plaintiff's charge enter satisfaction on the judgment.

Afterwards in *Michaelmas* term 1725, there was a rehearing of this cause before Lord Chancellor *King*, when it was insisted for the plaintiff *Stent*, that it was indeed very reasonable the plaintiff should run the risk of the falling of the stock, were it to fall ever so low; but though it were fallen, yet ought he still to have some stock for his money.

On the other side it was said, that in this case the plaintiff and defendant must both be intended to know what they were trafficking in, (viz.) in a matter of a very precarious nature,

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(1) Vide *Cass* v. *Ruddle*, 2 Vern. 280. & ante 1 vol. 62. note 2.

STENT *v.* BAILIS.

in stock, which was in the power of the company, in regard they could stop any further transfer, and shut up the books at their pleasure, and the last agreement between both parties being, that the defendant should have his money in all events, whether the books opened or not, and since there was no fraud to be imputed to the defendant, who had himself been a fair purchaser of his stock, and not the first projector or inventor, the loss ought to rest where the law had laid it, and each side having equal equity, there could be no room for the Court to interpose.

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Lord Chancellor King: I cannot divide the loss, but would recommend it to both parties to treat together, and share the same, and for that purpose a day was given to the parties, who (as I hear) agreed the matter.

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6. Sim. 402.

COUNTESS DOWAGER OF COVENTRY *versus* WILLIAM EARL OF COVENTRY *and* SIR WILLIAM CAREY & ux'.

CASE 58.

1906. 2 Ch. 526.

Gilb. Chan. 285. Gilb. Eq. Rep, 160. 1 Eq. Ca. Ab. 348. 2 Eq. Ca. Ab. 87. pl. 9. 660. pl. 8 & 673. pl. 9. 9 Mod. 12. 1 Stra. 596. Max. in Eq. last case. 10 Mod. 463. Com. Rep. 312.

THE Countess Dowager of *Coventry*'s bill was for a specific performance of articles made on the marriage of *Gilbert* late Earl of *Coventry* with the plaintiff the Countess Dowager, by which articles *Gilbert* late Earl of *Coventry*, who was but tenant for life, with remainder to his first, &c. son in tail male, remainder to the defendant *William* now Earl of *Coventry*, covenanted to make a jointure of 500*l.* per annum upon his lady the plaintiff, pursuant to a power given him by his father's will.

Tenant for life with power to make a jointure, remainder over, tenant for life covenants to make a jointure to a wife in consideration of a marriage by virtue of his power, or otherwise, of 500*l.* per ann. and dies before making the jointure; equity will make it good.

The case was thus: *Thomas* Earl of *Coventry* being seised in fee of divers manors and lands of about 8000*l.* per annum, and having issue *Thomas* Lord *Deerhurst*, his eldest son, and *Gilbert* his second son, by his will dated 24 *March*, 1698, devised divers manors, &c. unto his eldest son (the Lord *Deerhurst*) for life, remainder to his first, &c. son in tail male, remainder to *Gilbert* his second son for life, remainder to his first, &c. son in tail male, remainder to the defendant *William Coventry* for life, remainder to his first, &c. son in tail male, remainders over, with a power given to any of the devisees for life (when seised) by any writing to settle any part of the premises not exceeding 500*l.* per annum, upon any wife which

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they should respectively marry, for her jointure, so as such wife brought a portion equivalent to such jointure.

The testator Earl *Thomas* died, having survived Lord *Deerhurst*, who left an infant son afterwards Earl of *Coventry*, but he dying an infant and without issue, the honour and estate came to *Gilbert* the second son.

Gilbert Earl of *Coventry* on his marriage with the plaintiff *Anne* only daughter of Sir *Strensham Masters*, in consideration of the marriage and of 10,000*l.* marriage portion, by articles previous to the marriage dated 23 *June* 1715, covenanted with trustees, at the request of Sir *Strensham Masters*, according to the power given to Earl *Gilbert* by the said Earl *Thomas*'s will, *or otherwise*, to settle lands of the value of 500*l.* per annum upon the said *Anne* his then intended wife for life as her jointure; Earl *Gilbert* also covenanted, that 5000*l.* part of the said 10,000*l.* portion, should be laid out in land and settled on the said *Anne* for her life, and further, that the heirs and executors of the said Earl *Gilbert* should pay 250*l.* per annum to the said *Anne* for her life, to commence after Earl *Gilbert*'s death, and this 500*l.* per annum to be settled pursuant to the power, and the 5000*l.* covenanted to be laid out in land, and the 250*l.* per annum covenanted to be paid, was to be in full of the plaintiff *Anne* the Countess of *Coventry*'s jointure.

The marriage soon afterwards took effect; and, [224]

Earl *Gilbert*, being requested by Sir *Strensham Masters* to make a jointure of 500*l.* per annum pursuant to the power, did accordingly direct the jointure to be made, and lands were set apart for that purpose of 500*l.* a year within the power, and the draught of the jointure was drawn and engrossed, but laid by for some time unexecuted. After which Earl *Gilbert* died suddenly at the *Bath*, without issue male, and leaving Lady *Anne Carey* wife of Sir *William Carey*, his only daughter, and residuary legatee, and the estate and honour came to the defendant the remainder-man *William* the present Earl of *Coventry*.

On whose behalf it was objected, 1*st*, that the said Earl the defendant claiming by way of remainder, did not derive any title under Earl *Gilbert*, and therefore was not to be bound by his covenant.

2*dly*, That the covenant for the making this jointure of 500*l.* per annum was only, that Earl *Gilbert* should make this jointure, by virtue of this power, *or otherwise*, so that (as was insisted) here was no specific lien on any of the lands within the power; but if Earl *Gilbert* had purchased lands of 500*l.*

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per annum, and had settled the same upon his Countess for her life, this had been a performance of the covenant.

3dly, That in this case the defendant the Countess Dowager was not without remedy, and that she ought to resort to the personal estate of Earl *Gilbert*, and sue her covenant against the personal estate, at least that the personal estate ought first to be applied towards satisfaction of this covenant.

[225] This case being spoke to before *Lord Chancellor Macclesfield*, his Lordship conceived that the plaintiff the Lady *Coventry* ought to be relieved, she claiming under a very valuable consideration; but whether against the remainder-man, or out of the personal estate of Earl *Gilbert*, remained a question with his Lordship, and therefore he desired to be attended with precedents, and to have the assistance of the judges.

Accordingly the Court was attended with precedents, and the case spoke to before *Lord Chancellor*, *Master of the Rolls*, and the Barons *Gilbert* and *Price*. When it was urged on behalf of Sir *William Carey* and his lady who was the only issue, executrix and residuary legatee of Earl *Gilbert*, that this jointure of 500*l*. per annum ought to be made good out of the real estate of the late Earl *Gilbert*, according to the draft drawn and engrossed by his Lordship's direction, and that the personal estate of Earl *Gilbert* should not, to the total disappointment of the will, be applied towards satisfaction of the covenant, the said personal estate not being sufficient for this purpose and also for the payment of the other debts of the testator.

That if the case had entirely depended on Earl *Gilbert*'s marriage-articles, these articles, would alone in equity have made a good appointment of the jointure.

Also that if the articles were out of the case, yet the draft of a jointure drawn and engrossed by the direction of Earl *Gilbert*, wherein the parcels amounting to 500*l*. per annum were set out and expressed, and the said Earl being taken away by a sudden death, these in a court of equity would have amounted to a good jointure.

[226] *Sed si non prosunt singula, juncta juvant.*

Then as to the power itself for the making of this jointure, it was created by will, the construction of which is always favoured beyond any other conveyance; created by the will of him who was owner of the estate, and for enabling the several branches of this noble family to make a jointure, consequently to promote them in marriage, which was the only means by which the family could be preserved and continued.

That the defendant the present Earl ought not to think much of this power, in regard the same will that created it did likewise create and limit his remainder; so that he, as well as the jointress, claimed under the same will, and had there been no will or settlement, Earl *Gilbert* would have been seised in fee, and the plaintiff the Countess would at least have had her dower, and the defendant the present Earl would not have had the remainder, but the same would have descended to Lady *Anne Carey* the daughter and heir of Earl *Gilbert*, from whom the defendant the present Earl was now endeavouring to take the small surplus of the personal estate and apply it towards making good the articles for this jointure.

And what made this still the harder was, that Earl *Gilbert* being tenant for life without waste, might have cut down three times the value of this jointure in timber growing in the park and in other lands belonging to this estate.

That this power of making a jointure being raised by the owner of the estate, and for the continuing of the family by marriage, any words though ever so improper, ever so unartfully expressed, yet if they would go so far as to shew the intention of the party, if the Court could from such words spell out the party's meaning, and that he intended thereby to make a jointure, this would be effectual for that purpose. [227]

But the case was much stronger, when such writing was made for a valuable consideration; and surely it would be difficult to say, what could be a more valuable consideration than this was, the consideration of marriage, and a marriage portion of 10,000*l.*

That if any of the circumstances requisite by the power should be wanting, where the jointure was made for a valuable consideration, yet equity would supply it; as for instance, if the jointure was made by a deed-poll instead of an indenture; if the deed were sealed and not signed; or if there were but two witnesses instead of three.

It was admitted, that if there should be a total non-execution (*a*) of the power, equity would not supply it, it being against the nature of a power, when the party has reserved to himself a liberty of doing or not doing a thing, for a court of equity to construe the act as done when there is no evidence of the intention of the party to do it; but in the present case the intention of the party that this jointure should take place, [228]

(*a*) *Note;* This distinction was taken by the Master of the Rolls (Sir *Joseph Jekyll*) in a solemn opinion given by him in the case of *Tomkin* versus *Sandys*, after the seals of *Hillary* Term 1718. & vide *Tollet* versus *Tollet*, post, 489.

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sufficiently appeared by Earl *Gilbert*'s directing the draft and the parcels, and by the draft's being engrossed, and his Lordship's being prevented only by sudden death from completing it.

It was said to have been admitted by the other side, that if the late Earl *Gilbert* had covenanted to settle a jointure of 500*l.* per annum pursuant to the power, upon the plaintiff *Anne*, for her life, this had been good, but the covenant being that the said Earl should by virtue of the said power *or otherwise*, settle this jointure on his Countess, from hence it was objected, that this word [otherwise] left the matter at large, left the covenantor at liberty to settle other lands, and therefore prevented this from being a specific lien upon this land, and spoiled all.

But this was observed to be *maledicta expositio quæ corrumpit textum;* it was intended in favour of the jointress, that one way or other she should in all events be sure of her jointure of 500*l.* per annum, either by virtue of the power or otherwise, and it would be very hard, that these words which were designed in her favour should be construed to her disadvantage.

That the jointress was in all events to have a jointure of 1000*l.* per annum, 500*l.* per annum by virtue of the power, 250*l.* per annum out of the lands to be purchased with the 5000*l.* and 250*l.* per annum secured by virtue of the covenant.

And it would be very unreasonable, that the plaintiff the Countess should be defeated by the present Earl of her jointure which the late Earl had a full power of making, and for so valuable a consideration had agreed and intended to make.

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That precedents had gone further than the principal case; as in the case of (*a*) Lady *Clifford* versus Lord *Burlington*, decreed 28 *June* 1700, by Lord Keeper *Wright*, where Lord *Clifford*, who by his family settlement was tenant for life, with power to make a jointure not exceeding 1000*l.* per annum, on his marriage with Lady *Arethusa Berkeley*, covenanted to settle lands in *Ireland* upon her of 1000*l.* per annum; and accordingly after the marriage he settled part of the manor of —— in *Ireland*, (being part of the premises within the power) on his lady for life, with a covenant that they were of the yearly value of 1000*l.* and afterwards died, but these lands coming out to be but of the value of 400*l.* per annum, on a bill brought by the widow, there being lands of the value of 1000*l.* per annum within the power, it was decreed that a commission should be awarded to add lands to those formerly settled, so as to make up 1000*l.* per annum.

(*a*) 2 Vern. 379.

The next precedent was that of *Hollingshead* versus *Hollingshead* decreed the 4 *June*, 1 *Annæ*, by the then Lord Keeper, (*z*) and was as follows: One *Samuel Mottershead* by will devised lands to the use of himself in tail, remainder to *Francis Hollingshead* for life, remainder to his first, &c. son in tail male, remainder over; with a power to the several tenants for life when in possession to make a jointure, so as such jointure did not exceed a moiety of the estate, and by the same will the testator gave a legacy to this *Francis Hollingshead*.

Samuel Mottershead the first tenant in tail died without issue, and during the infancy of *Francis Hollingshead*, there was a treaty for his marriage, which being agreed, his mother and he (the infant) covenanted with the wife's relations, that [230] within six months after *Francis*'s coming of age he should settle so much of the land as should amount to 100*l.* per annum upon his then intended wife for her life.

The marriage took effect, and they had issue a daughter, and the husband *Francis* dying afterwards without making the jointure, the widow brought her bill against the remainder-man for making good the same; in which case it was objected, 1*st*, that this covenant was made by an infant who could not covenant. 2*dly*, No land in particular was covenanted to be settled, but only so much as should amount to 100*l.* per annum.

But decreed by Lord Keeper, that this covenant was in equity a good execution of the power; wherefore a jointure of 100*l.* per annum ought to be made good to the wife, and that if a moiety of the premises which the husband had a power to settle would not make up 100*l.* per annum, the same should be made good out of the 1000*l.* legacy given to *Francis* the husband by the will. Which decree shewed that the land, if it might be had, was to be the fund; but if the land could not be had, then and not otherwise satisfaction was to be made out of the personal estate.

So in the case of *Alford* versus *Alford* decreed 5 *Dec.* 8 *Annæ*, by Sir *John Trevor* Master of the Rolls; (*y*) where one *Gregory Alford* settled land on himself for life, remainder to his wife for life, remainder to his first, &c. son in tail male, remainder to *Francis Alford* for life, remainder to his first, &c. son in

(*z*) See as to this case *Colton* v. *Hoskins*, 16 Vin. Ab. 486. *Jackson* v. *Jackson*, 4 Bro. C. C. 466.

(*y*) See *Jackson* v. *Jackson*, 4 Bro C. C. 466.

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[*231] tail male successively, remainder to *Edward Alford* in like manner, with power to *Francis Alford*, after *the death of *Gregory Alford* and *Anne* his wife, or any after-taken wife of *Gregory*, to settle so much of the premises not exceeding 100*l.* per annum in jointure to a wife.

Francis Alford in the life-time of *Gregory* covenants in consideration of marriage to settle lands of 100*l.* per annum upon his then intended wife, and afterwards *Gregory Alford* and his wife died without issue, and then *Francis Alford* who gave this covenant for a jointure, died without issue, whereby the premises came to the remainder-man *Edward Alford*. And the widow of *Francis Alford* having brought her bill against the remainder-man to make good her jointure,

It was decreed on considering many precedents, (as it is there expressed) that the covenant to make this jointure was a good execution of the power, and that the wife was well entitled to this 100*l.* per annum, and to all the arrears from her husband's death.

Now that was the case of a remainder-man as well as the present case, but in all other respects infinitely stronger, in regard that at the time of the said *Francis Alford*'s covenanting to make this jointure, he had not the power vested in him, it being to commence after the death of *Gregory* and his wife without issue male, and *Francis* made this covenant in the life-time of *Gregory;* however, *Gregory* and his wife, dying without issue in the life-time of *Francis* and his wife, such covenant was allowed a good execution of the power in equity, though it might be reckoned a sort of strain to call this an execution of the power before the very commencement thereof;

[232] but it shewed how much these powers and the execution of them are favoured when for a valuable consideration.

That these cases were all stronger than the principal case, and answered all the objections which had been made.

It was true the covenant in the present case was not in all events to settle any certain lands, but only to make a settlement of 500*l.* per annum of lands within the power or otherwise.

Why so it was in the cases before cited.

It was to be admitted, that in the principal case the late Earl *Gilbert* might have settled other lands of 500*l.* per annum, and this had been a satisfaction, but this was not done; it would be likewise admitted on the other side, that if the covenant had been to settle any certain lands within the power, it had been good.

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Now in this case the draft drawn and engrossed by the direction of Earl *Gilbert* reduced the land to a certainty, in which respect the principal case was stronger than the cases cited, and afterwards the execution of this deed was prevented by the sudden death of Earl *Gilbert*.

Besides, the articles made the plainest difference betwixt the 250*l.* per annum, part of this intended jointure of 1000*l.* per annum, and this 500*l.* per annum, that could be; 250*l.* per annum was to continue secured out of the personal estate by the covenant, but the 500*l.* per annum was intended to be secured out of the lands within the power, unless the said Earl had made some other jointure upon his lady, which he never did.

Upon the whole matter, if any regard was to be had to the several valuable considerations on which the covenant for the making this jointure was founded: [233]

If the intention, or the agreement of the party, an agreement to do what was admitted to be absolutely in his power, was to be considered:

If any allowance to be made for the accident which happened and prevented the execution of the engrossed deed which was to execute this power:

It was conceived that the plaintiff the jointress ought to have her jointure made good out of the lands within the power, and according to the draft, and that the small surplus of Earl *Gilbert*'s personal estate ought to go as intended to his only daughter, who was also his executrix and residuary legatee.

Accordingly it was so (*a*) decreed with the concurrence of the judges assistants, (viz.) that the defendant the Earl of *Coventry* should during his life confirm and make good the jointure. (1)

(*a*) 16 May 1724.

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(1) This case is more fully reported at the end of Maxims in Equity, and also in 1 Str. 596. and 9 Mod. 12, from whence the judges appear to have given their opinions solemnly on two points, first, that the acts done by Earl *Gilbert* had created a lien on the lands in the possession of the defendant, and, secondly, that the defendant had no equity to have those lands exonerated out of the personal assets of Earl *Gilbert*— On the first (and principal) point the reasons are reported very much at length, and the substance of them appears by the decree which "declared "that although the said *Gilbert* Earl "of *Coventry* was but tenant for life "of the estate, yet by the said will of "*Thomas* Earl of *Coventry* his father "he had a power to settle an estate "for life of the yearly value of 500*l.* "on such wife as should bring a por-"tion equivalent to such settlement, "and the plaintiff having brought such "portion is a purchaser for a valuable "consideration, and by virtue of the "power which the said Earl *Gilbert* "had on the estate, the articles execu-"ted by him on his marriage with the "plaintiff are a lien thereon. And the

" Court further declared that the said " deeds of 5 & 6 *July*, 1719, having " been prepared and engrossed by the " directions of the said Earl *Gilbert*, " the same ought to be taken to be a " specification of the lands to be settled " on the plaintiff, and the lands therein " mentioned ought to be bound thereby, " and by the marriage articles, although " the said deeds of settlement were not " actually signed and sealed by the said " Earl *Gilbert*, and doth therefore order " that the said Earl do deliver to the " plaintiff the possession of the lands " comprised in the deeds of appoint- " ment of 5 & 6 *July* 1719, and that the " plaintiff do hold and enjoy the same " during her life against the said de- " fendant the Earl of *Coventry* and the " other defendants *Tho. Coventry* and " *Hen. Coventry*, and all claiming " under them; and that the defendant " the Earl of *Coventry* do account for " the rents and profits from the death " of Earl *Gilbert*, &c." Reg. Lib. A. 1723, fol. 291. On the second of the above-mentioned points, i. e. the application of the personal estate, vide *Edwards* v. *Freeman*, post. 435. *Evelyn* v. *Evelyn*, post. 664. (z)

(z) On the subject of supplying defective execution of powers see *Tollet* v. *Tollet*, post, 489, and cases there collected.

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TERM. S. TRINITATIS, 1724.

CASE 59. MANATON *versus* MANATON.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 252. pl. 8. One seised in fee, and indebted by bond in which his heirs are bound, devises his lands to A. for life, remainder to his first, &c. son in tail, remainder over. In a bill brought by the bond-creditors, the Court will not decree the devisee for life to account for the profits, but only to keep down the interest: also the Court will decree a sale to satisfy the bonds, though the lands be not devised for payment of debts.

ONE seised of lands in fee, and being indebted to several persons in bonds in which his heirs were bound, devised his lands to *A.* for life, remainder to trustees during the life of *A.* to preserve contingent remainders, remainder to the first, &c. son of *A.* in tail male successively, remainder over, with power to *A.* the tenant for life to make leases of the premises for one, two or three lives at the old rents, which were very small, and conventionary rents, the lands lying in the West of *England*.

The devisee for life took the profits and raised considerable sums by leasing the premises out for lives, and by taking of fines, and had a son born who was now twenty-one.

And the creditors by bond bringing a bill for recovering the money due to them,

[235] The *Master of the Rolls* decreed, 1*st*, an account of the

personal estate, and then that the devisee for life should account for the rents and profits of the real estate.

But the devisee for life appealing from this decree, and praying a sale,

Lord Chancellor doubted whether there could be a sale decreed, there being no devise of the land for the payment of debts, and took time to consider of it.

And at another day, the cause being in the paper for judgment, they who prayed a sale insisted, that the Court had often decreed a sale against the heir for the payment of bond debts; for that the land descended was assets, and as such ought to be sold; and that it had been so decreed in the cases of *Trevor* and *Trevor*, and *Meller* versus *Edisbury*.

That with respect to the money arising by the taking of fines, these were temporary sales; and though the tenant for life were not to account for the profits, nor do more than keep down the interest out of the profits, yet he should account for all the fines which he had raised by leasing.

Lord Chancellor: It is sufficient that the devisee for life should keep down the interest; and therefore the decree, that he shall account for all the rents and profits of the premises is not right.

As the testator in this case died seised of different kinds of estates, one usually let for lives at conventionary rents, and the other at rack-rents, let the Master first order the sale of the lands let at rack-rents, and if those be not sufficient, then so much is to be sold as is requisite, of the lands granted out for lives, and on which the small rents are reserved, and in such case, in regard the fines taken by the devisee for life, must have lessened the sum for which such lands will sell, the devisee for life, if any of these lands are sold, must account for the fines, which shall here be taken as part of the purchase-money.

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But if the sale of the lands let at rack-rent can produce money sufficient for the payment of the debts, then (I take it) that the devisee for life shall not account for the fines which he has received, because the devisee in remainder will have the same benefit of raising what money he can by fines, and so every one in his turn will enjoy the like liberty.

1909. 1. Ch. 393.

CASE 60.

ELIZABETH WHITCHURCH & al' *versus* JOSEPH WHITCHURCH & al'. (1)

At the Rolls.
Gilb. Rep. 168.
1 Stra. 619.
9 Mod. 124.
2 Eq. Ca. Ab. 763. pl. 10.
A. possessed of a term of 500 years in Blackacre, afterwards purchases the fee-simple in B.'s name, and devises Blackacre to J. S. in fee, but the will is not attested by three witnesses; the term shall not pass, because attendant on, and part of the inheritance.

EDWARD *Whitchurch* took a mortgage of *Batcomb Lodge* from one *Bisse* for 500 years to commence from the making, for securing the sum of two hundred pounds and interest, and afterwards took another security of the same lands from *Bisse* the mortgagor for one thousand years in the name of another person, but in trust for himself, to commence also from the making.

After this *Edward Whitchurch* purchased the inheritance of the premises in his own name, and having no wife or issue male made his will all of his own hand-writing, whereby he
[237] devised the premises to his nephew, being the son of his younger brother *Joseph Whitchurch*, for his life, remainder to his son *Edward Whitchurch* and to the heirs male of his body for ever, and made his brother *Joseph Whitchurch* his executor and residuary legatee.

It happened that this will, though intended to be perfected as a will, by reason of the testator's sudden death had neither a date or name subscribed thereto, neither was it attested, but the executor proved the same in the spiritual court, and assented to the devise to the nephew; whereupon the elder brother's daughter, who was heir to the testator, brought this bill in order to compel the executor and the devisee to assign over the term to her.

Objected for the defendants, that the executor had assented to the devise, and the will, though not attested by three witnesses, was however good at law to pass this term of 500 years, which was a subsisting term and not merged in the inheritance, by reason of the intermediate term, and which intermediate term operated as a grant of the reversion and not as a grant of a future interest, (for it was admitted that a future interest would not prevent a merger) but this grant of 1000 years being to commence from the making did pass the reversion for 1000 years; *quod fuit concessum per cur'*.

Then if this would pass the term at law, and was agreeable to the intention of the party, it was said to be very hard that equity should interpose in disappointment of the will, especially

(1) Reg. Lib. B. 1723. fol. 421.

when it was in favour of so near a relation as a nephew of the testator and one of his own name, and all this for the sake of one not more nearly related, of one who on her marriage would (probably) part with her name; that in all cases betwixt volunteers (as the heir and devisee were here) he that had the law on his side used to prevail. [238]

But decreed by *Master of the Rolls*, That as this was a term which would have attended the inheritance, and in equity have gone to the heir and not to the executor, in which respect it was to be considered as part of the inheritance, so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term.

That though it was true, such a will as in the present case would be sufficient to pass a term in gross, yet should it not pass a trust of a term attendant on an inheritance, nor consequently the term itself.

That a will not attested as the statute of frauds requires should not pass any estate of which the heir, as heir, would otherwise have had the benefit.

That if the devisee of the land had brought a bill against the executor and heir to have compelled the executor to consent to this devise, a court of equity would not have decreed it for the devisee (*z*); and if so, the voluntary act of the executor's consenting would not alter the case, for at that rate it would be in the power of the executor to make it a good or a void devise, just as he should think proper.

Besides, the Court observed that it was the intention of the testator in the present case not to pass the term only, but also to convey the inheritance which was expressly disposed of by the will, to the nephew for life, remainder to his first, &c. son in tail.

Though as to this it was said to be extremely hard, that because quite so much as was intended could not pass, therefore the devisee should be deprived of that which might lawfully pass, and which was a less estate than was intended him, or, because *all* could not pass, therefore *nothing* should. [239]

However, for the abovesaid reasons the Court decreed the devisee and executor to join in assigning the term to the plaintiff the testator's heir at law; but no costs on either side. This

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(*z*) So, a term to attend the inheritance cannot be claimed in equity by him who has lost the right to the inheritance by fine, &c. *Reynolds* v. *Jones*, 2 S. & S. 213.

WHITCHURCH *v.* WHITCHURCH. decree was afterwards affirmed on an appeal by the Lords Commissioners *Gilbert* and *Raymond.* (1)

(1) Sed vide the distinctions taken by Lord Commissioner *Raymond,* in delivering his opinion on this case 9 Mod. 127. Vide etiam *Villiers* v. *Villiers,* 2 Atk. 72. *Willoughby* v. *Willoughby,* 1 T. R. 763. and Amb. 282. *Goodright* v. *Sales,* 2 Wils. 329. *Scott* v. *Fenhoulet,* 1 Bro. C. C. 69. Harg. Co. Litt. part of note to 290 b. (*z*)

(*z*) *Brett* v. *Sawbridge,* Sugden, Vendors, 445, (6th edit.) *Capel* v. *Girdler,* 9 Ves. 509.

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TERM. S. MICHAELIS, 1724.

2. Eq. 164. 3. —. 460. 2. Ch. 630. 33. Ch. D. 327. (a) 3. Ch. 387. 1908. 2 Ch. 273.

CASE 61. WHITFIELD *versus* BEWIT.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 589. pl. 1. A. tenant for life, remainder to his first, &c. son in tail, remainder to B. for life, remainder to his first, &c. son in tail, remainder to C. in tail; A. cuts down timber; A. and B. having no son born, C. is entitled to the timber both in law and equity.

ONE seised in fee of lands in which there were mines all of them unopened, by deed conveyed those lands and all mines, waters, trees, &c. to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of *A.* for life, remainder to his first, &c. son in tail male successively, remainder to *B.* for life, remainder to his first, &c. son in tail male successively, remainder to his two sisters *C.* and *D.* and the heirs of their bodies, remainder to the grantor in fee. (1)

A. and *B.* had no sons, and *C.* one of the sisters died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A. having cut down timber sold it and threatened to open the mines; the heir of the grantor being seised of one moiety *ut supra* by the death of one of the sisters without issue,

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(1) It appears by Reg. Lib. B. 1723. fol. 576. that there were in this case trustees to preserve the contingent remainders, and the bill expressly stated applications to have been made to the heir of the surviving trustee, to interpose and put a stop to the commission of the waste, but that he refused to act.

brought this bill for an account of the moiety of the timber and to stay *A.*'s opening of any mine.

1*st Obj.* As to the plaintiff's claim of the moiety of the monies arising by sale of the timber, in regard the plaintiff comes into equity for the same, it would be more agreeable to the rules of equity, that the monies produced by the timber should be brought into Court, and put out for the benefit of the sons as yet unborn and which may be born. That these contingent remainders being *in gremio legis* and under the protection of the law, it would be most reasonable that the monies should be secured for the use of the sons when there should be any born; but as soon as it became impossible there should be a son, then a moiety to be paid to the plaintiff; and the case would be the same if there were a son *in ventre sa mere;* or the plaintiff might bring trover, and then what reason had he to come into equity?

Cur': The right to this timber belongs to those who at the time of its being severed from the freehold were seised of the first estate of inheritance, and the property becomes vested in them. (1)

As to the objection that trover will lie at law, it may be very necessary for the party who has the inheritance to bring his bill (2) in this Court, because it may be impossible for him to discover the value of the timber, it being in the possession of,

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(1) Vide *Bewick* v. *Whitfield*, post. 3 vol. 267. *Rolt* v. *Lord Somerville*, 2 Eq. Ca. Ab. 759. pl. 8. *Garth* v. *Cotton*, 3 Atk. 751. and 1 Vez. 524, 546. S. C. Harg. Co. Litt. 218. *b.* Note (2).

(2) Vide *Jesus College* v. *Bloom*, 3 Atk. 262. and Amb. 54. S. C. *Garth* v. *Cotton*, ub. sup. (*z*)

(*z*) S. C. from Lord *Hardwicke*'s written judgment, Dick. 183. In *Lee* v. *Alston*, 1 Bro. C. C. 194, 3 Bro. C. C. 37, 1 Ves. jun. 82, Lord *Thurlow* was of opinion that the mere circumstance of timber having been wrongfully cut down gave a right to an account; and accordingly, though the bill prayed an injunction, the decree was for an account only; Reg. Lib. B. 1782. 534. But the later cases have decided, according to *Jesus College* v. *Bloom*, that the right to an account depends upon the right to an injunction; *Pulteney* v. *Warren*, 6 Ves. 89. *Universities of Oxford and Cambridge* v. *Richardson*, 6 Ves. 689. *Grierson* v. *Eyre*, 9 Ves. 346. *Richards* v. *Noble*, 3 Mer. 673. This rule, however, does not extend to cases where there is no remedy at law for waste already committed; an account may there be decreed without an injunction; *Garth* v. *Cotton*, ub. sup. *Marq. of Lansdowne* v. *Marchioness Dowager of Lansdowne*, 1 Madd. 116. In *Dench* v. *Bampton*, 4 Ves. 700, it was holden that a lord could not have an injunction against his copyholder to stay waste, but was left to his legal remedy by forfeiture. But this is overruled in *Richards* v. *Noble*, ub. sup.

WHITFIELD *v.* BEWIT.

and cut down by the tenant for life. This was the very case of the Duke of *Newcastle* versus Mr. *Vane*, where at *Welbeck* (the Duke's seat in *Nottinghamshire*) great quantities of timber were blown down in a storm; and though there were several tenants for life, remainder to their first and every other son in tail, yet these having no sons born, the timber was decreed to belong to the first remainder-man in tail.

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Neither do I think the defendant ought (as he insists) to be allowed out of this timber what money he has laid out in timber for repairs, since it was a wrong thing to cut down and sell the same, and shews *quo animo* it was done, not to repair but to sell. (z)

One seised in fee conveys the lands and all trees and mines to trustees in fee, to the use of A. for life, remainders over; A. cannot open the mines or cut down the trees.

2*dly*, It was urged, that the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to *A.* for life, and like *Saunders*'s case in 5 *Co.* 12. where it is resolved, that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the *cestui que use* for life might open them.

But *Lord Chancellor contra: A.* having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water, was, that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor *King* on a rehearing.

(z) Co. Litt. 53 b. Com. Dig. Wast. D. 5. *Gower* v. *Eyre*, Cooper, 156. But ecclesiastical persons are not bound to apply the *identical* timber in repairs, *Knight* v. *Moseley*, Ambl. 176. *Wither* v. *Dean of Winton*, 3 Mer. 421. *Herring* v. *Dean of St. Paul's*, 3 Swan. 509. Nor trustees of a charity, *Attorney G.* v. *Geary*, ib. 513. Qu: in the case of a copyholder taking timber by assignment, *Dench* v. *Bampton*, 4 Ves. 703.

CANNEL *versus* BUCKLE.

CASE 62.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 23. pl. 24. 136. pl. 1.

Feme gives a bond to her intended husband, that in case of their marriage she will convey her lands to him in fee; they marry; the wife dies without issue, and then the husband dies; the bond though void in law, yet is good evidence of the agreement in equity; and the heir of the husband shall compel a specific performance against the heir of the wife.

A FEME sole was seised in fee of land of about 10*l.* per annum, and designing to marry, agreed with her intended husband, that she upon the marriage would convey her lands to the husband and his heirs; and for that purpose, previous to the marriage, she gave a bond of 200*l.* penalty to the intended husband, in which the intended marriage was recited, and the condition was, that in case the marriage took effect, she would convey all her said lands to the husband and his heirs.

1 Vern. & Ca. 549.
2 Vern. & K. 537.

The marriage took effect, and there was issue of the marriage, and the wife made her will reciting her said bond, and devised all her land to her husband in fee and died.

The issue of the marriage died without issue; after which the husband enjoyed the land during his life, and on his death the heir of the husband brought a bill against the heir of the wife, to compel him to convey the lands of the wife to the heir of the husband.

Obj. This bond given by the wife became void upon the intermarriage, because it was then (1) suspended; and a personal action once suspended is extinct: besides, wherever no action lies at law to recover debt or damages, there no suit in equity lies to compel a specific performance, which specific performance is given in equity only in lieu of damages; and 1 *Chan. Cases* 21. (Lady *Darcy's* case) was cited, proving that where a woman on a treaty of marriage agrees with a man, or a man with a woman, there the subsequent intermarriage determines the agreement.

[244]

Lord Chancellor: The impropriety of the security, viz. a bond from a woman to a man whom she intends to marry, or the inaccurate manner of wording such bond, is not material; for it is sufficient that the bond is a written evidence of the agreement of the parties, that the feme in consideration of marriage agrees the man shall have the land as her portion; and this agreement being upon a valuable consideration shall

(1) Vide *Gage* v. *Acton*, Com. Rep. 67. and 1 Salk. 325. S. C. *Acton* v. *Pierce*, 2 Vern. 480. (*z*)

(*z*) *Milbourn* v. *Ewart*, 5 T. R. 381.

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be executed in equity. (z) It is unreasonable that the intermarriage, upon which alone the bond is to take effect, should itself be a destruction of the bond, and the foundation of that notion is that in law the husband and wife being one person, the husband cannot sue the wife on this agreement; whereas in equity it is constant experience, that the husband may sue the wife or the wife the husband, and the husband might sue the wife upon this very agreement in the principal case. Neither is it a true rule which had been laid down by the other side, that where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance, as is plain from this case: suppose a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband; if this were done in consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages. (1)

See Dodsly v Kinnersley in Ambler's Rep: 406.

See Jarmain's Bythewood Vol 9. P. 31.

[245] But in regard this bond was a very stale one (being given so long since as in 1678) and the husband had for so long a time omitted to sue upon it in equity, the Court ordered a trial at law to see whether this bond was executed or not, and all other matters to be respited till after the trial. (2)

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(1) As to the case put by Lord *Macclesfield* of the feme infant, vide *Lucy* v. *Moor*, 3 Bro. P. C. 514. *Price* v. *Seys*, Barnard. 122. *Seamer* v. *Bingham*, 3 Atk. 56. *Harvey* v. *Ashley*, 3 Atk. 607. *Earl of Buckinghamshire* v. *Drury*, 5 Bro. P. C. 570. (y) *Durnford* v. *Lane*, 1 Bro. C. C. 106. *Williams* v. *Williams*, 1 Bro. C. C. 152. *Slocombe* v. *Glubb*, 2 Bro. C. C. 545. (x)

(2) Reg. Lib. A. 1723, fol. 484.

(z) *Hobson* v. *Trevor*, ante 191. *Wright* v. *Lord Cadogan*, 2 Eden, 239. *Prebble* v. *Boghurst*, 1 Swan. 309.

(y) S. C. 2 Eden, 39.

(x) The result of the cases is, that a woman cannot be bound by any marriage contract entered into during her minority, as to *her* real estate. *Carruthers* v. *Carruthers*, 4 Bro. C. C. 500. *Clough* v. *Clough*, 5 Ves. 717, 3 Wooddes. 453. *Milner* v. *Lord Harewood*, 18 Ves. 275. *Lecky* v. *Knox*, 1 Ba. & Be. 210.

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2 Keen. 96.

OSGOOD *versus* STRODE & al'.

CASE 63.

1 C. H. Pl. 140

Lord MACCLESFIELD.
10 Mod. 533.
2 Eq. Ca. Ab. 25. pl. 26.
Father and son on the son's marriage article to settle lands on husband for life, remainder to the wife for life, remainder to the issue male of the marriage, remainder to the nephew in fee; whether on the death of the husband and wife sans issue, the nephew can compel a specific performance of the covenant.

LAWRENCE *Head* seised in fee of the manor of *Winterton* (*in com.' Berks*) had issue *Lawrence Head*, *Edward Head*, *Grace* married to one *Osgood*, and several other sons and daughters; and upon the marriage of his eldest son *Lawrence* with *Mary Disher* he settled good part of the premises upon his said son *Lawrence* and his wife *Mary* and the issue male of the marriage, with a power to raise 1300*l.* on the premises if there should be no issue male and but two daughters, which happened to be the case.

Lawrence the son and his wife died without issue male, leaving two daughters, the defendant *Mary* wife of the defendant *Strode*, and *Eleanor* (since dead) married to one *Coxwell*, who left issue the defendant *John Coxwell*.

Old *Lawrence Head* the father afterwards by indenture of settlement in 1676 settles the premises to several uses, (subject to the charge of 1300*l.* to his two grandaughters) with a power of revocation and limitation of new uses.

Afterwards by indorsement on the said indenture of settlement (the indorsement being dated the 23d *February* 1690,) old *Lawrence Head* revoked the old uses, and limited a new use to his son *Edward Head* in fee; but old *Lawrence Head* continued in possession, neither had he (for ought appeared) any other estate save this of *Winterton*. [246]

Afterwards old *Lawrence* paid the two daughters of his eldest son *Lawrence*, the defendant *Mary* and the said *Eleanor* 650*l.* a-piece, (in all 1300*l.* being their portions secured on the premises) and took a receipt from each of them in writing: subsequent to which,

On a treaty of marriage betwixt *Edward Head* then eldest son of old *Lawrence Head* with *Elizabeth Pocock*, by marriage articles dated 29 *May* 1697, in consideration of the said intended marriage and 600*l.* portion paid to the said *Edward Head* the son, old *Lawrence* and *Edward Head* both covenanted with the trustees within a month after the marriage to convey the said manor of *Winterton* to the said trustees and their heirs, to the use and intent that *Elizabeth* the intended wife of *Edward Head* should have a rent-charge of 60*l.* per annum issuing out of the premises for her life for her jointure,

OSGOOD *v.* STRODE.

and that *Lawrence Head* the father should have a rent-charge of 50*l.* per annum out of the premises for his life.

And that subject to these rent-charges the premises should be settled on *Edward Head* for his life, remainder to his first and every other son in tail male by that marriage, then with a provision for pecuniary portions charged on the premises for the daughters of that marriage, remainder to *Lawrence Head* a grandson to old *Lawrence* by another deceased son and his heirs male (who is since dead without issue) remainder to his grandson *John Osgood* son of *Grace Osgood* the eldest daughter of old *Lawrence* and his heirs male, remainder to the right heirs of old *Lawrence Head* the father.

[247] *Lawrence* the father died within three days after the articles, having continued in possession of the premises till his death. The wife of *Edward Head* the son died without issue; and on the 27 *October* 1722, the said *Edward* died without issue, but by his will devised the premises to the defendants his heirs at law.

And now the said *John Osgood* brought his bill against *Strode*, *Mary* his wife, and *John Coxwell*, who were the heirs at law, as well of *Lawrence Head* the father, as of *Edward Head* the son, to compel a conveyance of the premises to the plaintiff *John Osgood* in tail male pursuant to the articles, all the precedent estates being determined.

Against which it was objected for the defendants, that though the limitations in the articles to the wife of *Edward* for her jointure of 60*l.* per annum, and of her husband *Edward*'s estate for life, and the remainder to the issue male of the marriage, were all limitations made on valuable considerations, and must be supposed to be stipulated for by the friends of the wife, or by the wife, in consideration of the marriage and portion: yet,

The subsequent limitation to the plaintiff *John Osgood* was merely voluntary, and out of the consideration of the marriage or portion, and purely the bounty of him from whom the estate moved; that it had been often determined that one and the same settlement might be on good consideration in part, and voluntary and fraudulent as to the rest, and so might articles be.

[248] Then if the limitation to the plaintiff *Osgood* in the marriage articles were merely voluntary, (as they insisted it was) it had never been known that a court of equity did compel an execution of a voluntary agreement.

That the reason why on articles for a purchase where the

money was paid, a court of equity compelled an execution of such articles was, for that it was unreasonable the covenantor, who had received the money, should retain the land; but as upon a *nudum pactum* there was no remedy at law, so neither was there any in equity. OSGOOD *v.* STRODE.

And though in case of a covenant or agreement by deed there was no consideration requisite, the covenant being good without any, yet at law such a covenantor would recover but 3*d.* or such like damages, and matters of so slight a value were beneath the dignity of this Court.

Also several cases were cited of copyholds being devised without any previous surrender, under which circumstances equity would never supply the want of a surrender, unless in case of debts, for younger children, or a provision for a wife.

So in the case of (*a*) *Fursaker* and *Robinson*, where when a man made a defective conveyance of some copyhold or customary land to his bastard, with a covenant for further assurance, yet this being a voluntary conveyance (though to his own natural child) this Court would not compel the heir of the covenantor to make further assurance. (*a*) Preced. in Chan. 475.

And Mr. *Talbot* cited and much relied on the case of Sir *James Bellingham* versus *Lowther*, 1 *Chan. Ca.* 243. where Sir *H. Bellingham* on his marriage with *Catherine Lowther* covenanted to settle certain freehold lands to the use of himself and *Catherine* his intended wife for their lives, remainder to the heirs male of his body by her, remainder to the heirs male of his own body, remainder to his brother *Allen Bellingham* in tail, remainder to the heirs of Sir *Henry*, and covenanted to settle certain copyhold lands to the same uses. Sir *Henry Bellingham* was travelling to make a surrender of his copyhold lands pursuant to his covenant, but fell sick by the way; however he made a letter of attorney to others to make this surrender, but dying before it was done the copyhold descended to his daughter as heir general. And, [249]

The brother *Allen Bellingham* who was the remainder-man in the articles, brought his bill to have this covenant executed by the heir at law, for the conveying of the copyhold to him in tail *prout* the articles; and there it was said that the covenant was voluntary as to the brother *Allen Bellingham*, he being no party to the articles nor within the consideration of the marriage or marriage portion, and that the articles might be fraudulent as to the brother though good as to the wife and issue of the marriage, and a voluntary conveyance to a younger brother ought not, if defective at law, to be made good in equity

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against an heir; for which reason the then Lord *Keeper* dismissed that bill, and would not compel an execution of such voluntary articles; which Mr. *Talbot* said came very near the principal case, but was stronger by reason of the accident of death.

[250] Also it was insisted, that in this case in the covenant for settling this estate the heirs of the covenantor were not named, and consequently not bound, and it was a constant rule, that in a covenant or warranty if the heir was not named he was not bound.

Besides, that in this case it appeared not to have been *Edward*'s intention that *Osgood* should have the premises after his death, he having by his will given the same to his heirs at law.

To all which it was answered, that this bill did not seek to defeat a purchaser or hurt a creditor; that it was only to compel an heir who was *pars antecessoris* to perform the articles of his ancestor, an heir whom any voluntary conveyance would bind, and this in a court of equity too where articles amounted to a conveyance.

That this was not a voluntary limitation as to the plaintiff *Osgood*, who in the articles was named the grandson of old *Lawrence Head*, and consequently it was part of the marriage agreement, and the marriage was the consideration and occasion of the limitation in the articles. That,

Upon the circumstances of this case old *Lawrence Head* the father must be intended to be the owner of the estate, or at least that it was in trust for him.

That it could not be supposed (though by the inducement of a power of revocation he had limited the premises to his son *Edward* in fee) but that this was in trust for himself, because

[251] it could not be intended that he would strip himself of all that he had; which notion was still farther confirmed by his continuance in the possession of the premises to the time of his death. So likewise by the limitation in the articles of 50*l.* per annum rent-charge to old *Lawrence* for his life, with an estate for life only to *Edward Head*, remainder in tail to his sons by that marriage, remainder to the plaintiff *Osgood*, with remainder in fee to the right heirs of old *Lawrence;* for it would be difficult to imagine that *Edward Head* the son would ever have accepted of those limitations to himself, or have agreed to the limitations to his father, if he had been then owner of the estate.

Then taking old *Lawrence Head* to have been owner of the

estate, it might be reasonably believed that when he was desired by his son *Edward* or the wife's relations to come into this settlement, he consented to it on terms, and might say, "I will part with my estate upon your marriage, but it shall be "so settled, that if you my son *Edward* die without sons it "shall then go to my grandson *John Osgood* and his issue "male; nay I will have the estate so firmly secured to my "grandson *John Osgood*, that it shall not be in the power of "you to bar that remainder, but that you shall be only tenant "for life, neither shall your issue male by any other wife be "preferred to my said grandson." And if this were so, then plainly that part of the articles whereby the limitation was made to the plaintiff *Osgood* could not be termed voluntary, since without that it was probable old *Lawrence Head* would not have entered into any articles at all.

Also I cited *Hurd. Rep.* 395. *Jenkins* versus *Kemish*, and 1 *Lev.* 150. 237, where Sir *Nicholas Kemish* on the marriage of his son *Charles Kemish* with *Blanch Mansell*, in consideration of this marriage and of 2000*l.* marriage portion, settled the premises to the use of himself for life, remainder to his son *Charles* and the heirs of his body by that marriage, remainder to the heirs of his body by any other wife, with a power to Sir *Nicholas Kemish* the father by deed to charge the premises with 2000*l.*

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Sir *Nicholas* borrows 2000*l.* and secures it by mortgage by way of lease and release of the premises in fee.

Afterwards Sir *Nicholas* dies, and his son *Charles* dies without issue by that wife, but leaving a son by an after-taken wife, and on a special verdict in ejectment it was resolved, that this mortgage in fee was not a good execution of the power for raising the 2000*l.* in regard this, if good, would be a dislodging of all the estates.

But then it was objected, that the issue male who would avoid the mortgage, being not by this marriage, on which the settlement was made, but by a subsequent marriage, the limitation to him was voluntary, and as against this mortgagee fraudulent:

But the very words of that great man Lord *Hale*, in *Hardres* are, "That the consideration of the marriage and the marriage "portion will run through all the estates raised by the settle- "ment, though the marriage be not concerned in them, so as to "make them good against purchasers, and to avoid a voluntary "conveyance;" which case came afterwards into this Court, and is in 1 *Chan. Cases* 103.

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And that it appeared by a note in the margin in 1 *Lev.* 152. that the Lord Keeper *Bridgman* was of the same opinion, that the consideration of the marriage and marriage portion ran through and extended itself to all the limitations in the settlement.

Now if this case was so, as this authority (which was a very great one) proved it to have been, it was stronger than the principal case; and shewed that the consideration of marriage makes all the limitations good, even against a purchaser or mortgagee; whereas they (the plaintiffs) were contending only against an heir, whom the most voluntary settlement would bind; and what would make a valuable consideration in case of a settlement, would make a valuable consideration in case of articles for the making a settlement.

That it was not necessary the consideration money should be paid by the party to whom the conveyance was made, but if a third person paid it, that would be sufficient to prevent the conveyance or articles from being voluntary, and consequently in the present case, the portion which was paid to *Edward Head* was a consideration for all the limitations in the marriage articles; also in these articles *John Osgood* was called the *grandson* of old *Lawrence Head* who made the settlement, and then the consideration of blood was a sufficient consideration against an heir, though (perhaps) not against a purchaser.

Or if the estate were construed to move from *Edward Head*, the plaintiff *Osgood* was *nephew* to him, and that blood was as to him a sufficient consideration.

It was sufficient to raise an use, and what was so, would be a sufficient consideration also to raise a trust in equity.

[254] For suppose a man had before the statute of *Hen.* 8. of uses, covenanted to stand seised to the use of his grandson or his nephew, this certainly would have raised a use, and such as a court of equity would have compelled the execution of. And

By the same reason, if a man in consideration of blood were to covenant to settle lands upon his grandson or nephew, this would raise a trust, and a court of equity would look to the execution thereof, which was the principal case expressed in the very articles; and this differed from the case of *Fursaker* and *Robinson*, where in a defective conveyance a covenant to make further assurance to a bastard was held not good, in regard there was no blood, and a covenant to stand seised to the use of a bastard would be void.

As to the objection that the heirs were not expressly named in these articles, it seemed to be wholly immaterial; for if the consideration were good to raise a trust (as on the part of the plaintiff it was contended to be) then the ancestor from the time of the execution of the articles, was a trustee for all the trusts therein; and supposing the ancestor to be a trustee, his heir who stood in his place must be a trustee also.

And it would be a plain case, if a man for money by him received should covenant to convey lands to *J. S.* but should not covenant for his heirs, yet the receipt of the money would make him a trustee, and he being so, his heir after his death must be a trustee also.

That with respect to the will of *Edward Head*, by which he undertook to devise the premises from the plaintiff *Osgood*, that [255] was likewise immaterial, his intentions as to this case must be all immaterial, he and his father old *Lawrence* having bound the estate by their articles, and put it out of their power to devise or give it away to any other person.

Lastly, it was insisted, that if the Court would not help the plaintiff, it ought not to help the heir, nor would it then compel the trustee of an old term for 500 years which was yet standing out to transfer that term to the heir at law.

Lord Chancellor: This last argument implies that the trustee should keep the estate himself, whereas it is plain he shall not, but shall be a trustee for him to whom the reversion shall be adjudged to belong. The marriage and marriage portion supports only the limitation to the husband and wife and their issue, this is all that is presumed to have been stipulated for by the wife or her friends.

A. seised in fee on his marriage covenants to settle the premises on himself and his wife, and on the issue of the marriage, remainder to his nephew in fee; the remainder in fee is voluntary, and not supported by the consideration of that marriage or of the marriage portion.

But as to the case cited in *Hardress* and *Levinz*, where there was a limitation to the heirs of the body of the husband by any other wife, that though not made for a valuable consideration, was not however fraudulent, for there was a fair and honest occasion for the making of such settlement, (viz.) the marriage; it could not well be intended to have been made to cheat a creditor, unless the person making the same were then in debt; the very remoteness of the limitation to a brother, or to the issue by an after-taken wife, was an evidence that such limitation was not intended to cheat creditors.

[256]

If old *Lawrence* the father had the whole estate, I do not

A. the father and B. the son on the marriage of B. articled to settle land on B. and his wife for their lives, remainder to their issue, remainder to the nephew in fee; if A. had the sole interest, the limitation to the nephew is voluntary; secus if the father and son had each some interest.

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see with whom he could contract, except with his son's wife and her friends, which will only make a good consideration for the husband and wife and their issue.

But what very much helps this case is, the appointment of the estate by old *Lawrence* by the indorsement to his son *Edward* in fee, which gave the son *Edward* the legal estate; and also old *Lawrence*'s having paid to his two grandaughters *Mary* and *Eleanor* 650*l.* a-piece, taking their receipt for this money, whereby old *Lawrence* obtained an interest in equity in this estate, at least a trust for the raising 1300*l.* upon it, and it cannot be intended, but that there was some trust betwixt old *Lawrence* and his son *Edward*, for that the former would not part with all he had in his life-time to his son *Edward*, which is rendered still clearer by his continuing in possession after his appointment to his son, and by the son's submitting to accept such limitations as are made him by the articles.

Wherefore each of them, the said old *Lawrence Head* and *Edward Head* having an interest in the premises, so that the one without the other could not make a settlement thereof; here is now a proper person for old *Lawrence* the father to stipulate with, viz. his son *Edward*, and it may be well intended, that old *Lawrence Head* did stipulate with his son *Edward* that he the said *Lawrence* would come into those articles and join therein, on terms that the estate should, in case of *Ed-*
[257] *ward*'s dying without issue male by that marriage, and young *Lawrence Head*'s dying also without issue male, then go to the plaintiff *Osgood;* and this probably was part of the marriage agreement and of the terms on which it was made, though the leaving out the sons of *Edward* by any other marriage might be a mistake.

But since this might be, and probably was, nay appears to have been the terms of this marriage agreement, and the inducement to old *Lawrence* to join therein, equity ought to decree a performance of it, but I will give no costs. (1)

And because the limitation by the articles is to *Edward* for life, remainder to his first, &c. son in tail male, though the limitation to the plaintiff *Osgood* be to him and his heirs male, which may seem to have been designedly distinguished by the parties from the former limitation, yet it being in case of articles, where a latitude is given to a court of equity to expound the same, I will construe it to be intended to the plaintiff *Osgood* and his sons in tail male, so that the premises shall be

(1) Reg. Lib. B. 1724. fol. 113.

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conveyed to him for life, but it shall be *sans waste*, with power to make such leases as tenant in tail may, with trustees to support contingent remainders, remainder to his first, &c. son in tail male, with the like remainder to the next person, viz. *Southby* for his life *sans* waste, with remainder to trustees to preserve contingent remainders, remainder to his first, &c. son in tail male, remainder to the right heirs of old *Lawrence*, who are the defendants *Mary Strode* and *John Coxwell*.

Note; In *December* 1725, this cause was reheard before Lord Chancellor *King*, who after long debate took notice, that several material things had been said against the decree; however in cases where he himself was not fully satisfied, he would never reverse his predecessor's decree; and that here his Lordship was not so well satisfied; that it appeared to him old *Lawrence Head* had an interest (at least an equitable one) in the premises; and it was considerable, that by these articles in question he had provided for every branch of the family, and as it seemed to be a very reasonable agreement for a settlement, his Lordship affirmed the decree for carrying the same into execution. (1)

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(1) Vide *Edwards* v. *Countess of Warwick*, ante 175. *Neeve* v. *Keck*, 9 Mod. 106. *Vernon* v. *Vernon*, post. 594 and 4 Bro. P. C. 26. S. C. *Goring* v. *Nash*, 3 Atk. 186. *Stephens* v. *Trueman*, 1 Vez. 73. *Ithell* v. *Beane*, 1 Vez. 216. *Roe* v. *Mitton*, 2 Wils. 356. (z)

(z) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92, 98. *Johnson* v. *Legard*, 3 Madd. 283, 6 M. & S. 60. *Clayton* v. *Lord Winton*, 3 Madd. 302. n. 6 M. & S. 67. *Sutton* v. *Chetwynd*, 3 Mer. 249.

WAGSTAFF *versus* WAGSTAFF.

CASE 64.

Lord MACCLESFIELD. 2 Eq. Ca. Ab. 763. pl. 12. Trust of lands limited to A. and his heirs and assigns, or to such as he or they shall appoint; cestui que trust devises these lands by a will attested but by two witnesses; the will void, and will not operate as an appointment. (1)

JOHN *Wagstaff* seised of lands in fee conveyed them by lease and release to trustees and their heirs, to the use of them and their heirs, in trust (that after such monies raised as therein mentioned) the trustees should convey the premises to *J. S.* his heirs and assigns, or to such person or persons as he or they should direct.

(1) So, *Attorney General* v. *Barnes*, 2 Vern. 598. *Duke of Marlborough* v. *Lord Godolphin*, 2 Vez. 76. *Jones* v. *Clough*, 2 Vez. 366. *Duff* v. *Dalzell*,

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The monies were raised, and *J. S.* by will, attested only by two witnesses, devised the premises to *J. N.*

Obj. The trust being that the trustees should convey the premises to such persons as *J. S.* his heirs or assigns should direct, this will, though not good by way of devise, shall however be effectual as an appointment, like a copyhold surrendered to the use of a will which may be devised by a will attested by two witnesses or one witness only. (1)

Copyhold surrendered to the use of a will shall pass by a will attested by one or two witnesses only.

But *Lord Chancellor* interrupted the Counsel, and said this was a very plain case; that as to the case * which had been put of a copyhold surrendered to the use of a will, and afterwards devised by a will attested by one or two witnesses, this had been adjudged to be good, and his opinion was *never to shake any settled resolution touching property or the title of land,* it being for the common good, that these should be certain and known, however ill grounded the first resolution might be; but if that had not been settled, it might be more reasonable to say, when I have surrendered my copyhold to the use of my will, a will of this copyhold shall be so executed, and in such a manner, as by the act of parliament a will of lands (*a*) ought to be executed, but this case having been ruled otherwise, he would not shake it, however he was not for carrying it one jot further.

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(*a*) See vol. 1. the case of Longford versus Eyre, 740. towards the end of the case.

That in the other case the copyhold passed by surrender, and not by the will, which was only a declaration of the use of the surrender; whereas in the principal case it was no more than a common trust of lands in fee-simple, (viz.) in trust for *J. S.* his heirs and assigns, or such person or persons as he or they should appoint; now these last words were no more than what was implied before, *& expressio eorum quæ tacite insunt nihil operatur;* where a trust is limited to *A.* and his heirs, *A.* may appoint the trust to *J. S.* and *J. S.* is then the assignee of *A.* Now,

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1 Bro. C. C. 147. and an instrument in its nature testamentary, made in execution of such power, has all the incidents to a will. *Hatcher* v. *Curtis,* 2 Eq. Ca. Ab. 671. *Oke* v. *Heath,* 1 Vez. 135. *Duke of Marlborough* v. *Godolphin,* ub. sup. *Lawrence* v. *Wallis,* 2 Bro. C. C. 319. (*y*)

(1) *Tuffnell* v. *Page,* Barnard. 9. and 2 Atk. 37. *Attorney General* v. *Andrews,* 1 Vez. 225. Harg. Co. Litt. 111. b. notes (1) and (3). (*x*)

(*y*) *Habergham* v. *Vincent,* 2 Ves. jun. 204, 4 Bro. C. C. 353.

(*x*) Or by any writing which would be a good will of personal estate. *Cary* v. *Askew,* 2 Bro. C. C. 58, 1 Cox, 241. *Doe* v. *Danvers,* 7 East. 299. But the probate is not evidence to establish such will as to copyhold estates. *Jervoise* v. *D. of Northumberland,* 1 Jac. & W. 570.

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There could be no question but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses in the same manner as a legal estate; for if the law were otherwise it would introduce the same inconveniences as to frauds and perjuries, as were occasioned before the statute by a devise of a legal estate in fee-simple.

* That in the case of (*a*) Dr. *Johnson*, where a man seised of lands in fee devised them to a charity by a will attested only by two witnesses, Lord *Cowper* had decreed the same to be void, notwithstanding it was there objected, that the will might operate as an appointment according to the statute of 43 *Eliz.* of *Charitable Uses.*

(*a*) Vide 2 Vern. 597. Devise of lands to a charity attested by two witnesses only, void.

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2*dly*, Besides the principal case was much stronger against the will, as the same did not refer to the deed of trust, but *J. S.* had undertaken to devise the land as owner thereof without any relation had to the pretended power (*z*); which made it like the case put 1 *Inst.* 111, 112. where, after the statute of *Hen.* 8. enabling people to dispose by will of two thirds of their lands held by knights-service, a man so seised made a feoffment in fee to the use of such persons and for such estates as he should by will appoint; here the fee by operation of law was held to continue in the feoffor, on whose limiting the estates by his will by force and in pursuance of his power, the uses and estates growing out of the feoffment would be good for the whole, and the will would be but directory; but in case the feoffor had devised the lands as owner thereof, without any reference to the feoffment or power thereby given, there the land passing by the will, such will would be good only as to two thirds.

Wherefore it was adjudged in the principal case that the will was void, and that the trustees should convey the premises to the heir at law of the testator. *See the next case.*

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MEMORANDUM, In *Hill.* vacation 1727, in a cause at the Rolls, his Honour admitted it to be settled that where a copyhold in fee is surrendered to the use of one's will, such will though executed in the presence of one or two witnesses only is good, because it passes by the surrender and not by the will, which is only a declaration of the use of the surrender (*y*);

Though where a copyhold is surrendered to the use of a will there need not be three witnesses to such will, because the copyhold passes by surrender and not by the will; yet a trust or equity of redemption of a copyhold cannot pass by a will unless attested by three witnesses.

(*z*) *Maundrell* v. *Maundrell*, 7 Ves. 567, 10 Ves. 246. *Blake* v. *Marnell*, 2 Ba. & Be. 35. 4 Dow. 248. *Langley* v. *Sneyd*, 3 Brod. & B. 243.

(*y*) And therefore a devise of a *cus-*

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but that if a copyholder be seised only of the trust or equity of redemption of the copyhold, and devises such trust or equity of redemption, there must be three witnesses to the will; for here can be no precedent surrender to the use of the will to pass this trust, and the trust and equity of redemption of all lands of inheritance are within the statute of frauds and perjuries, otherwise great inconvenience would arise therefrom; and it is no prejudice to the lord of the manor to comprise the trust of a copyhold within that statute, because the person who has the legal estate of the copyhold is tenant to the lord, and liable to answer all the services. †

† But in the case of *Tuffnel* versus *Page*, *Pasch.* 740. the Lord *Hardwicke* was of opinion, that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest. And decreed accordingly. Barnard. Chan. Rep. 12. and 2 Atk. 37.

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tomary freehold, where there is no custom in the manor to surrender such freehold to the use of the will, must be executed according to the statute of frauds; *Hussey* v. *Grills*, Amb. 299. By st. 55 G. 3. c. 192, wills of copyhold estate are made as valid although no surrender has been made to the use of the will, as they would have been if a surrender had been made. See, as to the construction of this statute, *Doe* v. *Bartle*, 5 B. & A. 492.

CASE 65.

SIR JOHN FRYER *versus* BERNARD.

Lord MACCLESFIELD. Sel. Ca. in Cha. 5. 2 Eq. Ca. Ab. 711. pl. 4. The Court of Chancery in England may grant a sequestration against the defendant in Ireland, but it must be after a sequestration taken out here and nulla bona returned.

UPON a motion for a sequestration against the defendant's real and personal estate in *Ireland*, it was alleged that the plaintiff had here in *England* proceeded to a sequestration, and that it would be vain to take out a sequestration here, the defendant having no estate any where but in *Ireland;* that a sequestration had been granted in the like case, as in that of (*a*) Lord *Arglass* versus *Muschamp*, where the Court granted a sequestration into *Ireland*, nay, that such process had been awarded to the governor of *North Carolina*.

(*a*) 1 Vern. 135.

[262] *Lord Chancellor:* The plaintiff ought at least first to take out a sequestration here, and upon *nulla bona* returned I will grant a sequestration which shall affect the defendant's estate in *Ireland*; the Courts of Justice here have a superintendent power over those in *Ireland*, and therefore writs of error lie in

B. R. in *England* to reverse judgments in *B. R.* in *Ireland*. (*z*) [*Sed Quære* to whom the sequestration against the defendant's estate in *Ireland* is to be directed, and if it should not be by an order from the *Lord Chancellor* reciting the proceedings here, and directing the *Chancellor* of *Ireland* to issue out a sequestration there for the benefit of the plaintiff, and towards satisfaction of his demands.]

FRYER *v.* BERNARD.

But as to the sequestration mentioned to be directed to the governor of *North Carolina*, or any other of the plantations, the Court doubted much whether such sequestration should not be directed by the King in Council, where alone an appeal lies from the decrees in the plantations, for which reason it seemed that in such case the plaintiff ought to make his application to the King in Council, and not to this Court. (*y*)

Application ought to be made to the King in Council for a sequestration to the foreign plantations.

(*z*) But by 23 G. 3. c. 28. no appeal or writ of error from any court in *Ireland* shall for the future be brought into any of the courts in *England*. The 39 & 40 G. 3. c. 67. (act of Union), article 8, provides for the bringing of writs of error and appeals from *Ireland* before the House of Lords of the *United Kingdom*.

(*y*) *Attorney General* v. *Stewart*, 2 Mer. 156.

MR. JUSTICE DORMER'S CASE.

CASE 66.

Lord MACCLESFIELD.

2 Eq. Ca. Ab. 581. pl. 2. Not a reasonable maxim that the next of kin to whom the land may descend shall not be guardian in socage.

SIR *William Dormer* bart. nephew of Mr. Justice *Dormer*, was found a lunatic in *March* 1693, whereupon their late Majesties King *William* and Queen *Mary* granted the custody of his estate to his uncle the now Mr. Justice *Dormer*, who is the next remainder-man in tail of the principal part of the family estate, but the person of the lunatic was granted to another.

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Afterwards these grants were upon the demises of the Crown frequently renewed, the custody of the estate being always granted to Mr. Justice *Dormer*, and that of the person of the lunatic to the other.

But in truth it appeared that the other person was only nominal and in trust for Mr. Justice *Dormer*, who all along had the lunatic in his own custody, and lived with his whole family in the lunatic's house in the county of *Bucks*, and it was in proof that Sir *Robert Jenkinson* who was the nominal committee for the person of the lunatic declared he knew nothing of the matter, or how the lunatic was managed, but that the lunatic was under the conduct and in the custody of Mr. Justice *Dormer*.

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Whereupon Mr. *Sheldon*, who was the lunatic's deceased sister's son, petitioned, that the custody of the estate might be taken from Mr. Justice *Dormer*, and that likewise the custody of the person might be removed, the same being now in effect in Mr. Justice *Dormer*, though in the name of Sir *Robert Jenkinson*.

And it having been ordered that 200*l.* per annum, part of the income of the lunatic's estate in *Gloucestershire*, which was subject to a mortgage of 850*l.* should be set apart to pay off the mortgage, and that the residue of the profits should be applied towards the maintenance of the lunatic and the management of his estate; the lunatic's said nephew complained in his petition, that this maintenance was excessive and to the prejudice of the next of kin, to whom would belong what the lunatic should leave at his death.

[264] *Lord Chancellor:* I found this order made for the commitment of the custody of the estate to Mr. Justice *Dormer*, and of the person to Sir *Robert Jenkinson*, whom I take to be a nominal person for Mr. Justice *Dormer*, and that the person of the lunatic has in fact been all along with Mr. Justice *Dormer;* and that such allowance has been made to the judge for the maintenance of the lunatic and management of his estate, is beyond dispute.

Surely the maxim, that the next of kin to whom the land cannot descend is to be guardian in socage, is not grounded upon reason, but prevailed in barbarous times before the nation was civilized; for what can be more usual now, than where one has infant children to make one's brother their guardian? and it seems no less reasonable that where a man dies intestate, the law should dispose of the guardianship of his children in the same manner as the intestate would be supposed to do, had he lived to make a will. (1)

It is very shocking to think that any brother or uncle would commit murder upon his own brother or nephew to get his estate; but in the present case here has been the strongest proof that there is not any ground for that cruel and barbarous presumption in Mr. Justice *Dormer*, who for these thirty-two

(1) Vide *Morgan* v. *Dillon*, 9 Mod. 135. and the same case by the name of *Dillon* v. *Lady Mountcashell*, 3 Bro. P. C. 341. Vide etiam Harg. Co. Litt. 88. b. note (6). (*z*)

(*z*) *Ex parte Cockayne*, 7 Ves. 591. *Ex parte Seaman*, 1 Collinson on Lunacy, 207.

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years last past has maintained his nephew in the most tender and careful manner, and who if he could have been supposed to have any ill designs upon his nephew the lunatic, might have executed them long since; this experience of the judge's tenderness towards his nephew is the strongest argument of his being the proper guardian for him; and as to the petitioner's complaint that the maintenance is too much, he seems to be taking more care of himself than of the lunatic in this case.

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A lunatic is never to be looked upon as irrecoverable. The lunatic's comfort to be regarded, and not his administrators or next of kin.

I think the improvements made of the lunatic's real estate are very commendable; the lunatic may recover, and then to see his estate in good condition and plight may be greatly to his comfort; and though he has been so long in this unhappy condition, yet a lunatic in the eye of the law is never looked upon to be desperate, but always at least in a possibility of recovering: It is his benefit and comfort I am to take care of where no creditor complains, and not to heap up wealth for the benefit of his administrators, or next of kin. (z)

Therefore I will not lessen the allowance nor alter the committee of the person; besides, nobody can tell who will be the lunatic's next of kin at his death, for he may live to bury all the next of kin that are so now. (1)

(1) See more of this case, post. 3 vol. 104.

(z) *Ex parte Chumley*, 1 Ves. jun. 296. *Ex parte Baker*, 6 Ves. 8. Nor will the Chancellor, even in favour of creditors, sell property of the lunatic which the creditors cannot otherwise reach, so as to deprive the lunatic of necessary maintenance. *Ex parte Dikes*, 8 Ves. 81. *Ex parte Hastings*, 14 Ves. 182.

TERM. S. HILL. 1724.

CASE 67. DR. MARTIN and LADY ARABELLA HOWARD his Wife } Plaintiffs;
NUTKIN & al' Defendants.

Lords Commissioners GILBERT and RAYMOND.

2 Eq. Ca. Ab. 23. pl. 22. The plaintiff's house being so near the church that the five o'clock bell rung in the morning disturbed her, the plaintiff came to an agreement in writing with the churchwardens and inhabitants at a vestry, that the plaintiff would erect a cupola and clock at the church, and in consideration thereof the five o'clock bell should not be rung in the morning; this a good agreement, and decreed to be binding in equity.

THE bill was brought against the defendants the churchwardens, and against the parson and overseers and several of the inhabitants of the town of *Hammersmith*, to stay the ringing of the five o'clock bell of the town of *Hammersmith*, which usually had been rung at five of the clock in the morning from *Michaelmas* to *Candlemas*, except upon holidays, and the twelve days at *Christmas*.

Myl. Ath. 537.

The case was, the plaintiffs Doctor *Martin* and Dame *Arabella Howard* his wife had a house at *Hammersmith* very near the church, and Lady *Howard* being of a sickly and weak con-

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stitution, was much disturbed and disquieted by the ringing of this bell at five of the clock in the morning, and was about parting with her house and removing to another parish, when it was intimated to her on behalf of the parish, that she might purchase her quiet at a reasonable sum to be laid out for the benefit of the parish.

Upon which it was proposed on behalf of the plaintiffs, that they should build a cupola to the church, and erect a clock and new bell, provided that during the lives of the plaintiffs and of the survivor of them, the five o'clock bell should not be rung; and accordingly, on a *Sunday* after morning service, notice was given at the church that the vestry would meet upon the occasions of the parish. In consequence of which they did meet; when this proposal was made and agreed to, and an entry being made of it in the parish vestry-book, the same was signed by the parson, church-wardens, overseers, and several of the inhabitants; after which the plaintiffs and the defendants the parson,

church-wardens, overseers and some other of the inhabitants executed articles reciting the proposal and agreement at the vestry, and the plaintiffs thereby covenanted to erect a new cupola, clock and bell, and the defendants on their parts covenanted, that the five o'clock bell should not be rung during the lives of the plaintiffs, or the survivor of them; after this the plaintiffs caused the timber to be brought into the church-yard for the erecting of the cupola, which was publicly seen, and the plaintiffs were at the charge of erecting the cupola, clock and bell, and the five o'clock bell was silenced for about two years.

But the defendant *Nutkin* an ale-house keeper being since chosen church-warden, a new order of vestry was obtained for the ringing again of the five o'clock bell, which occasioned the plaintiffs to bring their bill to enjoin the ringing of this bell; [268] and on motion Lord Chancellor *Macclesfield* granted an injunction to stay the ringing until the hearing.

And now the cause came on before the Lords Commissioners *Gilbert* and *Raymond*, who decreed that the injunction should continue during the lives of the plaintiffs and the survivor of them; for that here was a meritorious consideration executed on the plaintiff's side; that the church-wardens were a corporation, and might sell the bells or silence them, and make a reasonable agreement beneficial for the parish, and thereby bind the parishioners and their successors as also the succeeding church-wardens; that the ringing the five o'clock bell did not seem to be of any use to the parish, though of very ill consequence to the plaintiff the Lady *Howard*, and ample recompense had been made to the parish by the plaintiffs both in the expense of the cupola, clock and bell, and also of 1500*l.* laid out in improving the plaintiff's own house, which otherwise they would have left; and it moreover appearing that the majority and better part of the parish continued willing to abide by this agreement and protested against the new order,

The Court thereupon decreed an injunction against the ringing of this five o'clock bell accordingly.

TERM. PASCHÆ, 1725.

CASE 68. ——— *versus* BROMLEY.

Lord Commissioner GILBERT. A. is indebted to B. B. outlaws A. and C. having goods of A.'s in his hands, B. brings a bill against C. to discover what goods of A. C. has in his hands. C. may demur, for that B. makes no title to the goods as having no grant from the Crown; also for that the Attorney-General ought to be a party.

A. WAS indebted to *B.* who out-lawed *A.*, and *C.* having goods of *A.* in his hands, *B.* brings a bill against *C.* to discover what goods of *A. C.* had in his hands; *C.* demurs in regard *B.* does not shew any title to these goods; and in support of the demurrer it was urged that by the bill it did not appear that *B.* the plaintiff had any grant of these goods, or of the debt from the Crown, until which grant the property remained in the Crown in consequence of the outlawry.

1. Sim. 490.

On the contrary I insisted that it was proper to know what these goods were and the value of them, before the party took out such grant, the expense of it being considerable; and that in the mean time the Crown was but as a trustee for the plaintiff who was at the expense of the outlawry.

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But by Lord Commissioner *Gilbert*, the Crown is not a trustee for the plaintiff, but it is merely out of grace that the King makes such grant of the goods of persons outlawed to the plaintiffs who have no manner of right in these goods, until the grant obtained from the Crown, so that the plaintiff comes too soon, it being before he has any title.

(*a*) Vide vol. 1. 445. Balch versus Wastal.

Wherefore allow the demurrer; also the (*a*) Attorney General ought to be a party to such bill.

CASE 69. JAMES *versus* GREAVES.

Lord Commissioner JEKYLL. Diversity betwixt a deed and a will gained from a weak man and upon misrepresentation or fraud; equity will set aside the first, but not the latter.

IN this cause it was said by Lord Commissioner *Jekyll* that there was a difference betwixt a *deed* and a *will* gained from a weak man and upon misrepresentation or fraud; for if a *will*

be gained from a weak man, and by false representation, this is (*a*) not a sufficient reason to set it aside in equity, as was determined in the case of the late Duke of *Newcastle*'s will betwixt Lord *Thanet* and Lord *Clare*, and in the case of *Bodvil* and *Roberts;* but where a *deed* (which is not revocable as a will) is gained from a weak man upon a misrepresentation and without any valuable consideration, the same ought to be set aside in equity. (1)

JAMES *v.* GREAVES.

(*a*) Vide 1 vol. 287. Gosse v. Tracy, contra.

(1) Vide *Bennett* v. *Vade*, 2 Atk. 324.

FELTHAM *versus* FELTHAM. [271]

CASE 70.

ONE having several daughters and being seised in fee of lands, by will charges the premises with the payment of his daughter's portions, 1000*l.* a-piece to each daughter at her age of twenty-two years or marriage which should first happen, and if any of his said daughters should die before her portion became payable, the share of her so dying to go to the survivors.

Lords Commissioners JEKYLL and GILBERT.

Sel. Ca. in Cha. 15.

2 Eq. Ca. Ab. 646. pl. 21.

One has several daughters, and being seised in fee charges his lands with 1000*l.* a-piece to his daughters payable at 22 or marriage; and if any die, then to the survivors, but no time limited when the additional portion should be paid to the surviving daughters. If one dies unmarried before twenty-two, the additional portion shall not be paid to the surviving daughters until the deceased daughter should have come to twenty-two.

One of the daughters dies before twenty-two or marriage, and another of the daughters attains twenty-two years of age.

Insisted that there being no time appointed when the portion accruing by survivorship should be paid, it ought to be paid presently.

Lords *Jekyll* and *Gilbert:* This portion arises out of lands, and it would be an hardship on the heir (whom equity favours) to make it payable before the time it was intended.

Now there can be no reason to make the additional portion payable before the original one, wherefore, as the heir is to suffer by the raising of these portions, it may reasonably be presumed in favour of him, that the testator might compute within what time they might be paid, so that this additional portion shall not be paid before such time as the daughter to whom it was given should have come to the age of twenty-two years if she had lived. (1) [272]

And (as I understood) the Court also declared that the other

(1) Vide *Laundy* v. *Williams*, post. 480.

FELTHAM *v.* FELTHAM. daughters should not have their shares of the portion so accruing by survivorship, until they respectively should have attained their age of twenty-two or be married, it not being the intention of the testator to trust any of his daughters with their portions until twenty-two or marriage. (1) (*z*)

(1) But this second point could not have been *determined* in the cause, as the eldest daughter appears to have been the only plaintiff, and the son (who was executor and residuary legatee) the only defendant. Reg. Lib. A. 1724. fol. 292.

(*z*) See *Moore* v. *Godfrey*, 2 Vern. 620.

CASE 71.

SAMUEL COX and HANNAH his Wife, and ELIZABETH BELITHA, } Plaintiffs;

WILLIAM BELITHA Executor of his Father EDWARD } Defendant.

Lords Commissioners JEKYLL and GILBERT.

2 Eq. Ca. Ab. 269. pl. 22, 23. 270. pl. 25, 26.

EDWARD *Belitha*, who was a freeman of *London*, had two daughters, viz. *Hannah* and *Elizabeth*, and one son the defendant *William*.

Though it may be a question, whether the child of a freeman of London, upon receiving a suitable portion, may release to his father his orphanage part; yet if the child or the husband of such child covenants to release to the executors after the freeman's death, this is good, and equity will execute the covenant.

3. Mod. 664. The plaintiff *Cox* married the eldest daughter the plaintiff *Hannah*, without the consent of her father, however after the marriage the father *Belitha* gave a portion to his said daughter of 4000*l.* 1400*l.* in money, and the rest in a leasehold and freehold estate, which was settled by the consent of the husband for the separate use of the wife, and afterwards to her children, and thereupon the plaintiff *Cox* the husband released to his father-in-law *Belitha* "all his right and interest which he had
[273] "or might have to any part of his personal estate by virtue of "the custom of the city of *London* or otherwise, except such "part as his father-in-law should give to him or his wife by "will or otherwise;" and by the said deed of release the plaintiff *Cox* covenanted at any time after the decease of his father-in-law *Belitha*, to do any further act "for the releasing "of any right which he might have by the custom of *London*, "to the executors or administrators of the said *Edward Belitha* "the father."

Obj. The interest which a child has in the orphanage part

by the custom of *London*, is a mere contingency, and no present right; consequently it can no more be released, than an heir may release before his father's death his right to his father's real estate.

Nevertheless the Court seemed inclined to think that the release being for a valuable consideration, purported an agreement to quit the right to the orphanage part, and to be binding (1) in equity; but though this might not be so clear, yet where the husband for a valuable consideration had covenanted thereafter to release the said future right, and the defendant having brought a cross bill to compel the plaintiff in the original cause to make such release to him, as executor to the freeman, and it being in proof that the executor had before the bringing the said suit tendered such release, and that the son-in-law had refused to execute it, the Court decreed a specific performance of the covenant by executing the said release to the executor of the freeman.

2*dly*, The Court held, that where a daughter was advanced in part, and the freeman the father had settled some leasehold estate to the separate use of the daughter the feme covert, this ought to be brought into hotchpot, it being in the strictest sense an advancement of the child *pro tanto*.

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3*dly*, It was held that any land of inheritance settled by the freeman upon his children is (*a*) not to be called an advancement either in part or in the whole within the custom of *London*, in regard lands of inheritance are not within the custom which affects only the personal estate (*b*) of the freeman; *secus* of a lease for years; but if lands of inheritance be given to a child by the freeman in bar of the orphanage part and accepted as such, it will be binding, or at least the child cannot have both.

Any lands of inheritance settled by a freeman on a child, no advancement; secus of a lease for years; but if lands of inheritance are given as an advancement, and in bar of the custom, and accepted as such, this will bind in equity.

4*thly*, In this case the freeman had left to his other daughter *Elizabeth* 3500*l.* as a legacy by the will, but it appeared to the Court that the said *Elizabeth* was but a weak woman and about forty years old and not like to marry, and it was positively sworn by the answer of the defendant the son, that the father after the making of the will had desired the defendant his son to secure an annuity of 250*l.* per annum to his sister the

Father bequeaths to his younger daughter 3500*l.* the son swears by his answer that his father on his death-bed recommended it to him to let

(*a*) *Note*; Lands of inheritance given by a father to a younger son is an advancement within the statute of distributions. (*b*) See the cases of *Babbington* v. *Greenwood*, and *Blunden* v. *Barker*, vol. 1.

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(1) Vide *Blunden* v. *Barker*, ante 947. *Medcalfe* v. *Ives*, 1 Atk. 63. 1 vol. 634. *Lockyer* v. *Savage*, 2 Stra. *Morris* v. *Burroughs*, 1 Atk. 401.

Cox *v.* BELITHA.

his sister have an annuity for her portion, the daughter has also a right to her orphanage part by the custom. The son being the father's executor agrees with his sister then forty years old, to give, and does settle an annuity of 250*l.* per annum on his sister in lieu of her portion; the other sister's husband is witness to the deed, and the agreement made by the consent of the relations. Bill brought by the other sister's husband to set aside this agreement, dismissed with costs.

plaintiff *Elizabeth* in satisfaction of her legacy; and accordingly *Elizabeth* after the death of her father (in a public manner with the consent of her relations and friends, by a deed to which the plaintiff *Cox* and his wife *Hannah* and the trustee in the father's will were witnesses) released * the said legacy of 3500*l.* and all her right to her father's personal estate by the custom of *London*, to the defendant her brother; and in consideration thereof the defendant the brother by mortgage secured an annuity of 250*l.* per annum payable quarterly to his said sister *Elizabeth* free from all taxes.

[* 275] And it was now objected by the plaintiffs that this annuity was not of equal value with the legacy; that the sister was hereby disabled from marrying, and that the same could be no consideration for the releasing the orphanage part.

Sed per Cur': It is a very ill thing in the plaintiff to endeavour by a bill to set aside that deed which he himself before supported by being a witness thereto; besides, according to the positive oath of the son by the answer which was read (and ought to be regarded) this was done by the son and accepted of by the daughter in piety to the directions of the father, and out of regard to his memory; it was done by the consent and privity of the whole family and of the trustee in the father's will, as thought better for the sister being a weak woman and not likely to marry, and was plainly for the benefit of the sister, it being a certain and plentiful provision to her for her life; whereas the money might be lost, which seems here to be sought after by *Cox* the brother, who probably brought his sister-in-law into this cause in hopes of making some advantage of her. And as to the objection that the annuity is not equivalent to the legacy; it is possible the sister might intend to be kind to her brother, betwixt whom there was the consideration of blood alone sufficient to raise an use even of a real estate, and the Court will not be nice in weighing the consideration betwixt brother and sister.

[276] Wherefore let the bill be dismissed and *Cox* only pay the costs, and let him be decreed in the cross cause to release his right to the customary part in pursuance of the covenant, and to pay costs there also.

JENNINGS *versus* LOOKS, & e cont'. CASE 72.

Lords Commissioners JEKYLL and GILBERT.

If I secure a portion to a child by deed payable at twenty-one out of land, and the child dies before twenty-one, the portion shall sink into the land and not go to the executor. So if I devise a portion to a child out of land payable at twenty-one, and the child dies before twenty-one, the portion shall sink. Also the portion shall sink as well for the benefit of the hæres factus as of the hæres natus. So though the money given to the child be not said to be for a portion, if it appears to be so in fact. If by the will the portion be given out of a real and personal estate payable to the child at twenty-one, and the child dies before twenty-one, then so much as will arise out of the personal estate shall go to the executor or administrator, but what would arise out of the land must sink.

ONE has two sons *Richard* and *Thomas*, and being seised in fee of the manor of *Blackacre* (which manor was in mortgage) makes his will thereby devising 1000*l.* to his younger son *Thomas* (being then about a year old) to be paid to him when he should have arrived at his age of twenty-one, out of the manor of *Blackacre*, with a power to the executor by felling of timber growing on the estate to raise such monies as his personal estate should fall short of, for the payment of his debts and legacies.

The younger son *Thomas* dies about the age of two years, and the eldest son dies about the age of six, upon which the estate comes to the uncle, and the mother having administered to the younger son claims the 1000*l.* legacy.

Against which it was objected, that this 1000*l.* being charged upon lands, and being also for a child's portion, though not by express words mentioned to be for a portion, yet the fact appearing to be so, and the child dying before such portion became payable, it ought to sink in the land, and not to go to the administratrix of the child, for which purpose the case of (*a*) *Poulet* versus *Poulet* was cited.

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(*a*) 2 Vent. 366. 1 Vern. 204. 321.

On the other side it was answered, that though it might be a true rule that where a portion is secured by a *deed* out of land for a child, and the child dies before the day of payment, such portion shall sink into the land for the benefit of the heir; yet it was otherwise in case of a *will*, and that in the principal case by the wording of the will, this 1000*l.* was *debitum in præsenti* though *solvendum in futuro*, for the bequest is *immediate*, viz. I *do give* my second son *Thomas* 1000*l.* and the future time is (*b*) annexed only to the payment and not to the legacy. Otherwise where I give a legacy to *J. S.* at twenty-one, for here the time being annexed to the legacy itself, if *J. S.* dies before twenty-one, it cannot go to his executors.

(*b*) Vide Salk. 415. Preced. in Chan. 317.

Lord Commissioner *Jekyll:* It was determined about the latter end of Lord *Sommers*'s time in the case of (*c*) *Yates* and *Fettiplace*, that where one by will gave a portion to a child out of a real estate, payable at a future time, and the child died

(*c*) 2 Vern. 416. Preced. in Chan. 140.

JENNINGS v. LOOKS.

before that time, the portion should sink; nay that it should sink as well for the benefit of † an *hæres factus* as of an *hæres natus*, for the former is substituted by the testator in the place of the latter; and the true reason is, that the legacy being given as a portion, when the child dies before the portion is payable, there is no occasion for it, and equity will not countenance the loading of an heir for the benefit of an administrator. (1)

[278] Then it was objected that though this might be true as to a portion given out of a real estate, yet here the legacy was a charge also upon the personal estate, and therefore (it was said) that if the real estate was not sufficient for the payment of the said legacy, yet the personal estate should be liable; and that this was the plainer from the executor's being empowered to fell timber for the payment of such of the legacies as the personal estate was not sufficient to pay.

Cur': This must be intended such of the legacies as the personal estate was liable to pay; it is true were the legacy chargeable on the personal as well as real estate, then so much thereof as the personal estate would extend to pay, should go to the executors or administrators of the child, but this is a charge only upon the land. (2)

3*dly*, It was contended that the guardian of the son who was in possession ought out of the profits to have kept down the interest of the mortgage, like the case where a man mortgages land and devises to *A.* for life, remainder to *B.* in fee, *A.* must keep down the interest.

Cur': That is not like the present case; for in the case cited, a third person the remainder-man and one not claiming under the tenant for life, would suffer by non-payment of interest; otherwise here, where the son was entitled to the whole fee-simple, and might when of age charge or alien the whole; and if a devisee in fee of a mortgaged estate be of age, and suffers the interest to grow greatly in arrear, his executor shall not be

† So an *hæres factus* is entitled to have the personal estate applied in exoneration of the real estate as well as the *hæres natus*. Preced. in Chan. 2.

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(1) The Court declared "that it was "not the intention of the testator, that "the sum of 1000*l.* devised to *Thomas* "*Jennings*, should be raised, in case "the said *Thomas* should die before he "attained his age of 21 years, and the "said *Thomas Jennings* dying before "he attained that age, the said legacy "of 1000*l.* falls into the inheritance "for the benefit of such person as is "entitled to the estate after payment "of the testator's debts and legacies." Reg. Lib. A. 1724. fol. 324.

(2) Vide Duke of *Chandos* v. *Talbot*, post. 609.

JENNINGS *v.* LOOKS.

bound out of the rents to keep down the same; but this being in the case of an infant and a guardian, it would be a great inconvenience, if the guardian might ruin the inheritance (which it is his duty to preserve) by letting the interest run on, and this to increase (1) the personal estate, which (possibly) he may be in expectation of; wherefore let the said guardian or his executor (in case of his death) answer the interest out of the profits. (*z*)

Note; Lord Commissioner *Jekyll* said, he took this to be a new case; and wondered it had not been before determined.

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(1) Guardian cannot change the nature of the infant's estate, unless by some act manifestly for the infant's advantage. *Tullit* v. *Tullit,* Amb. 370. (*y*)

(*z*) So *Sargeson* v. *Cruise,* cited in *Amesbury* v. *Browne,* 1 Vez. 477.

(*y*) See *Witter* v. *Witter,* post. 3 vol. 99.

TERM. S. TRINITATIS, 1725.

BARKER *versus* GILES.

CASE 73.

Lord Chancellor KING.

Sel. Ca. in Cha. 17. 9 Mod. 157. 2 Eq. Ca. Ab. 536. pl. 4.

A devise of lands to *A.* and *B.* and the survivor of them and their heirs, equally to be divided betwixt them share and share alike; *A.* and *B.* are jointenants for their lives, and have several inheritances.

ONE devises his lands to be sold for payment of debts and legacies, and the surplus of the money arising from the sale to be laid out in lands, and to be settled to the use of the testator's two nephews, *Jerome* and *Robert Barker,* and the survivors and survivor of them, and their heirs and assigns for ever, equally to be divided between them share and share alike.

Jerome Barker one of the devisees and nephews of the testator dies in the testator's life-time, and then the testator dies leaving *Penelope* wife of *John Blake* his heir at law.

The question was, what should become of the devisee *Jerome Barker* the nephew's moiety, whether it should descend as a lapsed devise and undisposed of to the testator's heir at law,

BARKER v. GILES.

or go to the surviving nephew and devisee the plaintiff *Robert Barker*.

[281] This cause was argued before the Lords Commissioners *Gilbert* and *Raymond*, who not agreeing, adjourned it over as a case of difficulty, and so it was the first cause that came on before Lord Chancellor *King*.

And it was agreed that money directed by will or articles to be laid out in land should be taken as land, wherefore it was the same thing in this case as if the devise had been of land itself. (*a*)

(*a*) See the case of Legate v. Sewel, vol. 1. 87.

But on one side it was argued that if *Jerome Barker* the nephew and devisee had survived the testator, he would have been tenant in common in fee, and not jointenant with the other devisee *Robert Barker*.

That jointenancy was an odious title in equity, there being no reason that because a man lived longest, and had the better constitution, therefore he should be entitled to the whole estate. (1)

That the intention of this will was to provide not only for the testator's two nephews personally, but also for their posterity; that the words [equally to be divided] were tantamount with saying, "I devise my lands to my two nephews in equal "parts;" or the same thing as to say *in moieties*, viz., one moiety to one and the other moiety to the other, which is an express tenancy in common created by the most proper words for that purpose; and to this Lord Commissioner *Gilbert* had agreed. See also *Lit. Tenures, sect.* 298, and the case of *Blisset* and *Cranwell*, 1 *Salk.* 226. and 3 *Lev.* 373. in point.

Then taking it that the nephews of the said testator would

[282] have been tenants in common, it was plain that upon one of these two devisees dying in the testator's life-time, his share became as a void devise, and lapsed to the testator's heir at law as an estate undisposed of by the will.

On the other side it was urged, that the words [equally to be divided] and [share and share alike] were but an implied tenancy in common in a will; and would not make a tenancy in common in a deed; and that it was for some time a (*a*) question whether they would make a tenancy in common even in a will; but still as it was but an implied tenancy in common, the word [survivor] creating an express jointenancy must prevail and take place, for which were cited 2 *Ro. Abr.* 90.

(*a*) See the case of Fisher and Wigg, vol. 1. 21. and post. 321. Doughty v. Bull.

(1) On this subject, vide *Staples* v. *Maurice*, 7 Bro. P. C. 49.

pl. 5. and *Styles* 211. in point; and that it would be against the rules of exposition to reject words in a will, especially so significant a word as *survivor* was.

But to this it was replied, that some words must be rejected either way, and there would be a necessity to reject more upon the other construction to make it a jointenancy; for then the words [equally to be divided] [and share and share alike] must all go for nothing; and *Blisset* and *Cranwell*'s case was much relied upon as being the last resolution in which the former cases in *Styles* and *Rolle* were cited and considered.

Lord Chancellor: It is a certain rule in the exposition of wills especially, that every word shall have its effect, and not be rejected if any construction can possibly be put upon it; and here I think there may; the first part of the devise being to two and the survivor of them, makes them plainly jointenants for life, and therefore they shall be so taken; and then, as to [283] the next words [and to their heirs equally to be divided between them share and share alike] these are plainly words importing a tenancy in common, and shall operate accordingly, so as to make them tenants in common of the inheritance, by which construction of the will every word takes effect; wherefore the two nephews would have been jointenants for life, with several inheritances to them in common: but one of them dying in the life of the testator, by that means the surviving nephew becomes entitled to the whole for life; and the inheritance being devised in common, the one moiety whereof having lapsed by the death of one of the devisees in the life of the testator, for this reason though the surviving nephew shall have the whole for his life, a moiety of the inheritance expectant upon the surviving nephew's death shall descend to the testator's heir at law, and the other moiety of the fee shall go to the surviving nephew's heir; and his Lordship said that if the bar were not satisfied with this opinion, he would take time to consider of it until the next morning; but it seems his Lordship delivered his thoughts with so much clearness that both sides acquiesced, and thereupon the cause was decreed as above. (1)

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(1) Vide *Lord Bindon* v. *Earl of Suffolk*, ante, 1 vol. 96. *Haws* v. *Haws*, 3 Atk. 524. and 1 Vez. 14. S. C. (*z*) *Stones* v. *Heurtley*, 1 Vez. 165. (*y*) *Rose* v. *Hill*, 3 Burr. 1881. *Wilson* v. *Bayly*, 5 Bro. P. C. 388. (*x*)

(*z*) S. C. 1 Wils. 165. Cru. Dig. Devise, c. xv. § 7.

(*y*) S. C. Cru. Dig. Devise, c. xv. § 21.

(*x*) *Folkes* v. *Western*, 9 Ves. 456. *Garland* v. *Thomas*, 1 N. R. 82. *Doe* v. *Abey*, 1 M. & S. 428. *Doe* v. *Tomkinson*, 2 M. & S. 165.

BARKER *v.* GILES. This decree upon an appeal to the House of Lords was affirmed. (1)

(1) 3 Bro. P. C. 297.

1. Sim. 458.

CASE 74.

ANONYMUS.

Lord Chancellor KING.

On every bill of review the plaintiff must deposit 50*l.* in order to answer costs, but no need of leave of the Court for such bill of review, unless it be founded upon new matter, and then the leave of the Court is necessary as well as the depositing of 50*l.*

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UPON every bill of review to reverse a decree the plaintiff must deposit 50*l.* with the register, in order to answer the costs of the suit to the * defendant; likewise if the bill of review be brought to reverse a decree upon new matter, as upon a deed discovered by the plaintiff since the former decree, in such case the plaintiff in the bill of review must have the leave of the Court for filing such bill, though there is no need of leave if the bill of review be brought to reverse a decree upon error appearing on the face thereof; but in the present case the plaintiff having deposited the 50*l.* and annexed an affidavit to the bill, that the deed on which the bill of review was founded did first come to the plaintiff's knowledge after the pronouncing the decree, the Court allowed the bill of review upon the plaintiff's paying the costs of the defendant's motion which was to dismiss the bill, for that it was filed without the leave of the Court. (1)

(1) Vide *Lord Bacon*'s Ordinances, Ord. 1. *Ld. Hardwicke*'s order, 2 Atk. 139. *Standish* v. *Radley*, 2 Atk. 177. *Gould* v. *Tancred*, 2 Atk. 534. *Norris* v. *Le Neve*, 3 Atk. 26.

CASE 75.

EAST *versus* RYAL.

Lord Chancellor KING.

2 Eq. Ca. Ab. 199. pl. 6. Governors of a charity though not guilty of corruption, yet if extremely negligent, to pay costs.

THIS came upon exceptions to a decree made by commissioners of charitable uses, where the governors of the free school of St. *Olaves* in *Southwark* joined in making a long lease for years of six houses belonging to the school at 5*l.* per annum rent, whereas the houses were worth 50*l.* per annum.

The *Lords Commissioners* decreed the assignee of this lease to surrender it back, and ordered the lessee and the governors to pay 70*l.* costs.

And now Lord Chancellor *King* affirmed the decree as to the surrendering the lease; but mitigated the costs by reducing them to 50*l.* saying there was no reason that the charity should pay the costs; on the other hand it was just, that the owner of the lease, who was to have the benefit of the breach of trust, should pay costs; and as to the governors, though they were to gain nothing by this and were not guilty of any corruption, yet they had been extremely negligent in their trust, for which they ought to be punished with some costs.

EAST *v.* RYAL.

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BIDULPH *versus* BIDULPH.

CASE 76.

LADY *Bidulph* as devisee of lands of inheritance under Sir —— *Bidulph*, brought a bill in equity against the heir to perpetuate the evidence of the will; the defendant the heir answered, and put the plaintiff to prove the will, who examined witnesses for that purpose, and the heir on his part cross-examined one of the witnesses to disprove the will.

2 Eq. Ca. Ab. 500. pl. 28. Bill by devisee against an heir to prove a will, the heir cross-examines the plaintiff's witness and refuses to release his right, yet the heir shall have his costs given him on motion; otherwise if he examines witnesses of his own.

And now the heir the defendant moved for his costs, in regard the plaintiff the devisee had made the like motion, and a day being given to shew cause why the plaintiff should not pay costs, Mr. *Mead* urged that the defendant the heir should not have costs, because he had put the devisee to some costs extraordinary by cross-examining the witness, and then there could be no reason that the devisee should pay those costs.

Lord Chancellor: This is the case of an heir disinherited, and it is unreasonable that he should be at any charge for the establishing of that will which is to his own prejudice; on the other hand it is for the advantage and benefit of the devisee to prove and perpetuate the testimony of this will; but though the heir be at liberty to ask questions of the plaintiff's witnesses, it may be reasonable he should not have costs, where he examines witnesses of his own.

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Memorandum, That in the case of *Angell* and *Brown* where there was a motion of the like nature, and not long after the case above reported, it was objected that the heir would not release his right to the premises; to which it was answered by the Court that this was not material, for that still the devisee had the fruit of his suit and the benefit of perpetuating the testimony of his witnesses; and that therefore the heir

BIDULPH *v.* BIDULPH. should have his costs, notwithstanding his having cross-examined the plaintiff's witnesses, and that it was reasonable the heir should have such power of cross-examining, otherwise the plaintiff would be at liberty to prove what he pleased. (1)

(1) Vide *Webb* v. *Claverden*, 2 Atk. 424. *Berney* v. *Eyre*, 3 Atk. 387. (*z*)

(*z*) *Vaughan* v. *Fitzgerald*, 1 Sch. & L. 316. *White* v. *Wilson*, 13 Ves. 91.

CASE 77.

STEPHENTON *versus* GARDINER & al'.

Lord Chancellor KING. 2 Eq. Ca. Ab. 79. pl. 3. Defendant has leave to plead, answer and demur, but not to demur alone. The defendant demurs and answers only by denying combination or some such trifling matter; demurrer set aside.

A BILL was brought to set aside a will relating to a personal estate only, and to stay the probate thereof, setting forth that the will was gained by fraud, by misrepresenting the plaintiffs who were the half brothers and sisters of the testatrix, and alleging that the will was falsely read to her, and setting forth divers instances of fraud on the part of the defendants in procuring this will.

The defendants (two of which were the executors) had an order to plead, answer and demur, but not to demur alone, and as to that part of the bill which sought to set aside the will and to stay the probate, they demurred to the jurisdiction, forasmuch as upon the face of the bill it appeared that the [287] plaintiffs were improper to sue here, in regard the spiritual court had the proper cognizance of wills relating to personal estates, and could determine fraud concerning them; and for answer said that they did not know the plaintiffs were the half brothers and sisters of the testatrix, and denied combination.

After which motions were made before the Lords Commissioners and Lord Chancellor *King* for an injunction, for that the demurrer confessed the fraud, and fraud was cognizable in equity as well as in the spiritual court.

(*a*) See the case of Plume and Beale, vol. 1. 389. The Court will deny an injunction on a bill brought to set aside a will of personal estate for fraud.

Cur' contra: (*a*) The spiritual court has jurisdiction of fraud relating to a will of personal estate, and can examine the parties by way of allegation touching this fraud, and if the will was falsely read to the testatrix then it is not her will. So deny the injunction.

But afterwards it was moved, that the defendants had not complied with the order, for they ought not to have demurred alone, and this in effect was demurring alone; for denying combination was nothing; and saying that they did not know the plaintiffs were half brother and sister was immaterial, and in effect no answer.

STEPHENTON v. GARDINER.

Wherefore for this reason the demurrer on motion was discharged, as not complying with the order of the Court, it being in effect a demurrer only. (1)

(1) So, *Lee* v. *Pascoe*, 1 Bro. C. C. 78. (*z*)

(*z*) Mitford, 170. (3d ed.) *Lansdown* v. *Elderton*, 8 Ves. 526. *Tomkin* v. *Lethbridge*, 9 Ves. 178. *Taylor* v. *Milner*, 10 Ves. 444. *Dyson* v. *Benson*, Cooper, 110. *Edmonds* v. *Savery*, 3 Mer. 304. *Sherwood* v. *Clark*, 9 Price, 259.

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SHEPHERD *versus* BEECHER.

CASE 78.

Lord Chancellor KING.

Sel. Ca. in Cha. 43.

2 Eq. Ca. Ab. 586. pl. 2. Father on binding his son apprentice gives a bond for 1000*l.* for his son's fidelity, the son embezzles 200*l.* which the father pays, but desires the master not to trust his son any more with the cash, the master does trust the apprentice again with the cash, and is negligent in calling him to account, the son embezzles 1000*l.* more; the father is liable, but not to answer more in the whole than 1000*l.* including the first 200*l.*

THE plaintiff placed his son an apprentice for seven years with the defendant who was a merchant at *Bristol*, and was bound in a bond of 1000*l.* penalty for his son's fidelity.

The son was bound an apprentice in 1712, and in 1715 embezzled 203*l.* of the master's cash, of which the master gave notice to the plaintiff the father demanding the money, and the father paid this 203*l.* to the defendant the master, but at the same time sent him a letter, desiring, that since the apprentice had been so ill a manager of the cash, he (the master) would not for the future trust the apprentice with any cash, at least that he would do it very sparingly.

However, the master having no other apprentice, and being a great dealer in the receiving and returning of money, still continued to intrust the plaintiff's son with the receiving of his cash; and about a year after called upon the apprentice for his accounts, when the apprentice in stating the account appeared to be indebted upon the balance 300*l.* but said he had bills sufficient to answer this, though he did not produce them, nor did the master make up the account with the apprentice,

SHEPHERD *v.* BEECHER.

until near two years after the expiration of the apprenticeship, and during that time got the apprentice to sign a *memorandum*, whereby he acknowledged he had embezzled 2750*l.* of the master's cash.

[289] The apprenticeship expired the 12th of *February* 1719, and the memorandum signed by the apprentice confessing the last embezzlement was dated 24 *Feb.* 1719, but the apprentice still continued with the master, and the master gave no notice of this embezzlement until about the middle of *July* 1721, and the defendant the master putting this 1000*l.* bond in suit against the father, the latter brought his bill in equity to be relieved against the bond.

Objected for the plaintiff, here has been an apparent and gross neglect in the master, who, after he had discovered the dishonesty of the apprentice, and after the father had satisfied him for the first embezzlement, being 203*l.* after the father had sent a letter of caution to the master, desiring for the future that he would not trust the apprentice with the cash, and when the master had in the year 1716 discovered the apprentice to be indebted to the cash 300*l.* still continued to intrust him to receive the cash, and had been so very remiss, as not to make up his account, until after the end of the apprenticeship, or to make any demand against the father until near two years after that; whereas had the master given earlier notice, the father might have called home his son and prevented any further embezzlement, wherefore the latter embezzlement being occasioned by the master's neglect, he ought to be the sufferer thereby; at least, if the father was to pay for this latter embezzlement, still the bond being but in 1000*l.* penalty, and the father having paid 203*l.* before, he ought not to do more than make up the whole 1000*l.*

Lord Chancellor: The father having given this bond for his son's fidelity, though there was an embezzlement, and though
[290] the father sent this letter to the master desiring him not to trust the son with receiving cash any longer, yet the father continued bound, and ought not to have satisfied himself with sending the letter and taking no further care of the matter, but should have endeavoured to have made some end with the master, and to have got up the bond; wherefore he must continue liable to answer some embezzlements, unless there should appear fraud in the master.

But at the same time, the father having given his bond of 1000*l.* penalty, seems to shew his intention and agreement to be, that the utmost extent of what he was to answer, was

but 1000*l.* and having paid 203*l.* before, he ought only to pay so much more as will make up the whole 1000*l.* so that the 203*l.* shall be taken as part, otherwise it might be hard; as supposing the former embezzlement had been 900*l.* and had been paid by the father, in such case the father, instead of answering but 1000*l.* must have been liable for 1900*l.*

To which it was replied, that the bond being forfeited at law, the master could there recover the whole 1000*l.* (*z*) and since the same would be recovered at law, if the master had really had so much of his cash embezzled by the son, it was reasonable that the son's father who was bound in this bond should pay the whole 1000*l.*

But *per Lord Chancellor:* The father seems to have intended not to make himself liable beyond the 1000*l.* and considering the circumstances of the gross neglect of the master in this case, and that he thereby was partly the occasion of this loss, it is reasonable that the 203*l.* paid by the father for the son's embezzlement should be taken as part of the 1000*l.* penalty. (*y*)

Let the parties go before the Master, and let the father pay [291] to the master what he proves to have been embezzled by the son during the apprenticeship, not exceeding the 1000*l.* penalty of the bond, but the 203*l.* already paid is to be taken as part of that 1000*l.* so that now the father at most is to pay 797*l.* and this being on a rehearing from a decree by his (*a*) Honour the Master of the Rolls, sitting in Court for Lord Chancellor *Macclesfield*, who ordered that the father should pay the whole 1000*l.* if so much should prove to be embezzled, without any abatement for the 203*l.* before paid on account of the former embezzlement, let the 10*l.* deposit be divided, the plaintiff having prevailed but in part upon this re-hearing.

(*a*) 28 July 1724.

(*z*) So *Scott* v. *Allsop*, 2 Price, 20.

(*y*) Mere negligence on the part of the obligee is no discharge to the surety, either at law or in equity. *Peel* v. *Tatlock*, 1 B. & P. 419. *Wright* v. *Simpson*, 6 Ves. 734. *Trent Navigation Company* v. *Harley*, 10 East, 34. *Samuell* v. *Howarth*, 3 Mer. 278. *Davey* v. *Prendergrass*, 5 B. & A. 187, and S. C. in Equity, nom. *Prendergast* v. *Davey*, 6 Madd. 124. See also *Ex parte Mure*, 2 Cox, 63. *Williams* v. *Price*, 1 S. & S. 581.

COPPIN *versus* COPPIN.

CASE 79. 15. Ves. 344 8. Sim. 19

A younger brother beyond sea having contracted to buy a real estate of his elder brother, makes his will charging his estate with great legacies, but the will is attested only by two witnesses; afterwards the testator dies without issue, leaving his elder brother executor and heir: the heir may retain out of the assets the whole purchase-money, though entitled again to the land as heir.

FRANCIS *Coppin*, the younger brother of the defendant *John Coppin*, having been unsuccessful in the former part of his life

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and contracted several debts, and failed in the world, and compounded his debts at 10*s.* in the pound, by the assistance of his elder brother the defendant *John Coppin* at length got an interest in the *East-India* Company, who employed him as one of their supercargoes to *Persia*, where having gained a very considerable personal estate, he wrote to his elder brother to find out a purchase for him.

Upon which the defendant his elder brother proposed to sell him an estate of his own at *Emberton* in *Bucks* for 4000*l.* and the said *Francis Coppin* to enter upon the premises as at
[292] *Michaelmas* 1718, which proposal by several subsequent letters was accepted by *Francis Coppin*.

Afterwards *Francis Coppin* made his will, whereby he gave several considerable legacies, and then came the following words, viz. "whatsoever shall remain in money, lands and goods, I "give the same to my brother *John Coppin*, who thereout is to "pay what I owe to my creditors at *Aleppo*, who have been so "kind as to compound my debts with me at 10*s.* in the pound, "and they to be paid without interest." After which he made the said defendant *John Coppin* his executor and residuary legatee, but the will had but two witnesses, and was made beyond sea in the said *Francis Coppin*'s return from *Persia*.

The purchase before agreed upon was in the life-time of the testator *Francis* executed, and the defendant *John Coppin* the vendor gave a receipt for the 4000*l.* purchase-money upon the back of the purchase-deed; but he swore that at that time nor any time afterwards he received no part of the purchase-money other than such sum as appeared on the account set forth by him; and this seemed admitted by the letter of the testator *Francis Coppin*, who died beyond sea in his return from *Persia* without wife or issue, and leaving the defendant *John Coppin* his elder brother and heir.

And now three bills were brought; one by the legatees for the recovery of their legacies, (of which the executor the defendant *John* had paid about a moiety) the said legatees suggesting, that this purchase was made by the defendant *John Coppin* for his brother, in which the defendant (as was objected) acted both as vendor and vendee, and the deeds of purchase
[293] having continued in his hands to the time of the said testator's death, was a fraudulent purchase as against the legatees.

The second bill was brought by the compounding creditors, upon a suggestion that their demands being originally debts, and what the testator thought in his conscience he was still obliged to pay, they continued to be debts in a conscientious

view, though in law released, and therefore were superior in their nature to legacies, for which reason they prayed that these might have the preference in payment, insisting further it was not material that those debts were in law released, if the testator thought them debts in conscience, and would not take the advantage of the release made to him by his said creditors, which he was not bound to do.

The third bill was preferred by *John Coppin* the heir and executor, alleging that he had paid the legatees more than the assets would extend to pay, merely upon a misrepresentation of the value of the testator's personal estate, which had suffered unexpected losses, and therefore insisting, that if he, through importunity or kindness to several of the legatees that were his relations, had made payment of legacies beyond the assets, such over-payments should be refunded.

Wills made beyond sea of lands in England must be attested by three witnesses.

As to the first point (which was the chief and of the greatest value) it was urged, that admitting the words in the will of *Francis Coppin* to have been sufficient to charge the land with the legacies, yet there being but two witnesses thereto, the will as to the land must be void, and it made no difference that the will was made beyond sea, the same being of lands in *England*, which if they pass by will, must pass by such a will, and so circumstanced and attested, as the laws of *England* require, especially it being by an *Englishman* born in *England*, who must be presumed to know the laws of his own country, or if he did not, *ignorantia juris non excusat;* that as to the purchase, it appeared by mutual letters betwixt the testator *Francis Coppin* and the defendant *John Coppin*, that it was a complete one; that the first proposal came from the testator *Francis Coppin;* that the time from which the purchaser was to receive the rents, and the sum to be paid were both settled, and the purchase fully agreed to and accepted by the testator *Francis;* that the tenants had notice of their having a new landlord, that the defendant *John Coppin* being applied to by others to sell the estate to them, had refused, declaring he had sold it to another, and though the defendant *John Coppin* did continue after this sale to receive the rents as formerly, yet that appeared by one of *Francis Coppin* the testator's letters to have been done at the request of the said *Francis* the testator, who desired the defendant to continue the management of this estate as before, until his return from beyond sea.

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On the other hand, as to the receipt indorsed for the purchase-money (and upon which *Lord Chancellor* laid some stress) this was represented to be a hard case, where the defendant was taking advantage of the will not being executed according

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to the statute by three witnesses, that as the deeds of purchase were all along in his power and custody, and produced by the defendant himself, it was hoped the Court would presume that all the purchase-money had been paid pursuant to the said defendant's own receipt, and the rather for that the defendant had examined no witnesses to prove that at the time of giving the

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receipt no money was paid; and what made this still the harder was, that the defendant the elder brother claimed the land discharged of the legacies as heir to his brother, and though he had the land, yet he also claimed to be paid for it by the testator, and consequently demanded so much of the purchase-money as was yet unpaid (which was pretended to be much the greater part) as a debt which would prevent there being assets for the payment of their legacies, and consequently for the fulfilling of his brother's will.

Receipt endorsed signed by the seller for the purchase-money, if the money be not really paid, is of no avail.

But at length it appearing by the testator *Francis Coppin*'s own letters, as well as by the positive oath of the defendant *John Coppin*, that the purchase-money was not paid, and there being no pretence of any proof of payment when the deeds were executed, or at any time before, and the defendant offering to submit this to an examination, *Lord Chancellor* passed over this point, saying that since the law gave the defendant this land by descent as the testator's heir at law, the Court could not take it from him, nor subject the land to any other charges than those which the testator by his will had effectually charged it with, and which in this case was nothing, the will being attested but by two witnesses. (1)

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(1) But the argument on the part of the legatees according to the report of this case in Sel. Ca. in Cha. 28. was, that although the will could not charge the lands, yet that a vendor has an *equitable lien* thereon for the purchase-money remaining unpaid on which head vide *Chapman* v. *Tanner*, 1 Vern. 267. *Pollexfen* v. *Moore*, 3 Atk. 272. *Walker* v. *Preswick*, 2 Vez. 622. *Fowel* v. *Heelis*, cited 1 Bro. C. C. 421. (*z*) *Tardiff* v. *Scrughan*, cited 1 Bro. C. C. 423. *Blackburne* v. *Gregson*, 1 Bro. C. C. 420. (*y*) and if so, this case came within the common rule of marshalling assets in favour of a legatee, whose legacy is not charged on the real estate. —This argument (which does not appear to have been considered by the Lord Chancellor in the present case) raised the principal question in *Pollexfen* v. *Moore*. (*x*)

(*z*) S. C. Amb. 724. Dick. 485.

(*y*) S.C. 1 Cox, 90. *Nairn* v. *Prowse*, 6 Ves. 752. *Elliot* v. *Edwards*, 3 B. & P. 181. *Hughes* v. *Kearney*, 1 Sch. & L. 132. *Mackreth* v. *Symmons*, 15 Ves. 329. *Cowell* v. *Simpson*, 16 Ves. 278. *Grant* v. *Mills*, 2 V. & B. 306. *Ex parte Loaring*, 2 Rose, 79. *Ex parte Peake*, 1 Madd. 346. *Saunders* v. *Leslie*, 2 Ba. & Be. 509. *Ex parte Parkes*, 1 G. & J. 228. *Winter* v. *Lord Anson*, 1 S. & S. 434.

(*x*) See *Austen* v. *Halsey*, 6 Ves. 475. *Trimmer* v. *Bayne*, 9 Ves. 209. *Mackreth* v. *Symmons*, 15 Ves. 338. *Headley* v. *Readhead*, Coop. 50. and Mr. Sugden's remarks on those cases, *Coppin* v. *Coppin*, and *Pollexfen* v. *Moore*, Sugd. Vendors, chap. 12. sect. 2.

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When several rights concur in the same person, to be considered as if in several.

That the only matter which made the difficulty in this case was, that here happened to be one and the same person both heir and executor of the testator, and likewise vendor of the land; but this must be considered in the same light as if there were several persons, *& cum duo jura in unâ personâ concurr', æquum est ac si essent in diversis*, and then taking it that they had been several, one the heir, the other executor, and the defendant *John Coppin* a third person, neither heir nor executor, but vendor, the person who was heir would have a plain title to the land purchased, the person that was executor must out of the testator's personal assets have paid the residue of the purchase-money to the defendant *John Coppin* the vendor, who would have as plain a title to receive it; under these circumstances every thing had been so plain as to have admitted of no dispute, and in justice and reason it ought to make no difference, (the facts being clear) that the same person happens to be the vendor, and afterwards the heir and executor of the vendee.

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One by will gives several legacies, & inter al' to such of his creditors with whom he had formerly compounded their debts; this but a legacy and not to be preferred to other legacies.

As to the second point, the Court thought that the compounding creditors, having once released their debts, which were thereby become extinct, they were out of the case as creditors, and must now claim as voluntary legatees, and could have no other title than to legacies in such manner as given by the will.

That the testator might easily and by express words have given them the preference, if he had so intended; but it would be dangerous to make a construction beyond the words of the will, that being to make a new will for the testator; that if one gives a legacy to (*a*) a charity, it is not to be preferred to other legacies, unless expressly so directed by the will.

(*a*) Ante 25. Attorney-General v. Robins, & vol. 1. 421. Masters v. Masters.

Executor pays beyond assets, he cannot make the legatees refund. (1)

As to the last point, viz. the defendant *John Coppin*'s cross bill, by which he prayed to be repaid the legacies which through misrepresentation he had paid, his Lordship took notice, that there did not appear to have been any fraud or misrepresentation made use of by the legatees to whom these payments had been made, and there being much more reason to think that the defendant *John Coppin* the executor was cognizant of and informed concerning the testator's circumstances, than the legatees, therefore he would order no refunding, and it being a hard case,

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No costs on either side.

(1) *Orr* v. *Kaimes*, 2 Vez. 194.

CASE 80. TURNER *versus* TURNER.

Lord Chancellor KING.

Sel. Ca. in Cha. 49.
2 Stra. 708.
2 Eq. Ca. Ab. 238. pl. 18.

AN infant who by the custom of gavelkind was one of three co-heirs of a real estate, by his *prochein amy* brought his bill to establish a will whereby that estate was pretended to be devised to him only.

An infant by prochein amy brings a bill and never stirs in it after he comes of age, and the bill is dismissed. The infant and prochein amy are both liable to pay costs.

2. Q. B. D. 578.

The Court directed an issue, which was found afterwards against the plaintiff.

The *prochein amy* died before the costs taxed, and the infant came of age, but never afterwards proceeded one step; and the cause being now set down purely upon the costs reserved, it was objected by Mr. *Talbot*, that where an infant sues by *prochein amy*, it is the *prochein amy* only who is to pay the costs, for any one may bring a bill in the infant's name, and if it be an insolvent *amy*, the defendant may apply to the Court (1) in order to have a solvent *prochein amy* named, which if the defendant does not do, it is his own fault, and it would be an hardship upon the infant who is not supposed to be capable of judging of the right, propriety, or justice of a suit, to be subject

(1) *Quære*; for in *Squirrel* v. *Squirrel* in *Linc. Inn Hall*, 17 *Decem.* 1791, a bill having been filed by a feme covert by her next friend against her husband, it was moved on the part of the defendant, that all proceedings in the cause might be stayed, until the *prochein amy* should give security for costs, or another *prochein amy* be named, which application was supported by an affidavit of the bad circumstances of the *prochein amy*. But Lord *Thurlow* refused to make any order; and said he did not conceive that the Court could inquire into the circumstances of a *prochein amy*, more than those of any common plaintiff, in which case, though the plaintiff should be insolvent, a defendant cannot help himself; that in the cases of an infant or feme covert they were obliged to sue by a next friend, in order that there might be some person *sueable* for the costs (which the infant and feme covert themselves are *not*); but that the Court contented itself with making somebody *amesnable* in this respect, without going into an inquiry concerning his ability. *N. B.* There was in this case an additional circumstance upon which his Lordship in some degree relied, viz. that this application was made after the defendant had *answered*, which might be considered as a waiver of any application of this nature, though it was alleged on his part that he had not discovered the circumstances of the *prochein amy* until after answer. (*z*)

(*z*) S. C. 2 Dick. 765. and 1 Ves. jun. 409, *Anon.* So in *Davenport* v. *Davenport*, 1 S. & S. 101, the Court refused to inquire into the circumstances of a proposed prochein amy of an infant plaintiff; but in *Pennington* v. *Alvin*, ib. 264, the Vice-Chancellor distinguished the case of a *feme covert* from that of an *infant*.

to the costs of it, or to be put to his remedy over against his *prochein amy;* that it was plain in the present case the infant had no remedy over against his *prochein amy*, he being dead. TURNER *v.* TURNER.

Lord Chancellor: At law the infant is liable to pay the costs if the judgment be against him; (z) as if an infant brings an action of battery and has a verdict against him, he must pay the costs; and if the common law be so, why should it not be so in equity? otherwise an infant would be left at liberty to plague mankind as he thinks fit. [298]

And the Court being informed by the Register and clerk in Court, that the course was to dismiss the infant's bill generally with costs, without mentioning who should pay them,

His Lordship said he would dismiss this bill with costs; and (as he apprehended) upon a general dismission the defendant had his election whether he would sue the infant or *prochein amy* for such costs. (1)

(1) But on a rehearing the bill was dismissed *without* costs. 2 Stra. 708.

(z) But see Tidd's Pract. 92.

COCKROFT *versus* BLACK.

CASE 81.

Lord Chancellor KING.

2 Eq. Ca. Ab. 451. pl. 5.

THE plaintiff was a bond creditor for 120*l.* of the defendant's testator, and brought his bill to be paid out of the personal assets of the said testator.

An executor or administrator may retain out of the assets, as well for a debt due in trust for himself as for a debt due to himself.

The cause being heard, an account was decreed, and the Master to state any thing specially that he thought fit.

The Master reported that the testator before marriage gave a bond to *J. S.* a trustee for his wife to leave her 100*l.* at his death if she survived him, and that she surviving the testator her husband, claimed to retain this 100*l.* out of the assets, which created a deficiency to pay the plaintiff his 120*l.* [299]

Obj. The defendant the executrix cannot retain this 100*l.* the bond being made to a trustee and not to the executrix herself, indeed she might give judgment to her trustee *J. S.* on this bond, but the executor's right of retainer is where he cannot sue, and therefore for necessity shall retain; so that here the debts are to be paid in average, as has been often decreed by the Master of the Rolls.

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Lord Chancellor: It is true in strictness of law the executrix in the present case cannot retain, the bond not being made to herself; but since she may pay what bond she pleases first, and as it would be a vain thing for her to pay the 100*l.* to her own trustee with the one hand, and take it back from him with the other,

Therefore this bond made to her trustee shall be the same in equity as if made to herself. Accordingly it was ruled that the executrix was (1) entitled to this 100*l.* by which means but 5*l.* remained to the plaintiff. †

† *Q.* For in *Hill* versus *Underwood*, Trin. Term, 1739, Lord Chancellor seemed not satisfied with this resolution.

(1) *Loane* v. *Casey*, 2 Black. Rep. 965. (z)

(z) *Franks* v. *Cooper*, 4 Ves. 763. *Bowerbank* v. *Monteiro*, 4 Taunt. 844. *De Tastet* v. *Shaw*, 1 B. & A. 664.

CASE 82.

FRANKLIN'S CASE.

Lord Chancellor KING.

Sel. Ca. in Cha. 47.

A commission of review to reverse a sentence given by the Court of Delegates is matter of discretion and not of right; and if it be a hard case, the Chancellor will advise the Crown to deny it.

A WOMAN was supposed to marry *A.* first, and afterwards during his life to marry *B.* and in a cause of jactitation of marriage in the Spiritual Court in *Ireland*, the first marriage was affirmed; but on an appeal to the Delegates in *Ireland*, the same was disallowed, * and the second marriage adjudged good: by the second marriage there was issue, but none by the first.

[*300] And now there was a petition for a commission of review to reverse this last sentence of the Delegates in *Ireland*.

Lord Chancellor: A commission of review is not a matter of right, but purely in the discretion of the Crown, (z) and there being issue by the last marriage, and none by the pretended first marriage, this commission of review tends to bastardize and render illegitimate the innocent issue by the last marriage, which ought not to be favoured, so that I am against granting this commission of review, and shall advise the Crown accordingly.

(z) See *Hill* v. *White*, Mose. 29. *parte Fearon*, 5 Ves. 633. *Eagleton* v. *Matthews* v. *Warner*, 4 Ves. 186. *Ex Kingston*, 8 Ves. 438.

LORD CONINGSBY *versus* SIR JOSEPH JEKYLL, MASTER OF THE ROLLS.

CASE 83.

In the Duchy Chamber. 2 Eq. Ca. Ab. 59. pl. 3. On a demurrer to a bill, if the demurrer be allowed the plaintiff may amend his bill. Q.

LORD *Coningsby* brought a bill in the Duchy Chamber *versus* Sir *Joseph Jekyll*, who demurred to the bill, and the demurrer on argument being allowed, afterwards on motion Lord *Lechmere*, then Chancellor of the Duchy, gave leave to the plaintiff to amend, which the defendant the Master of the Rolls strenuously insisted to be utterly irregular, and the plaintiff ought to be put to bring a new bill, in regard that by the allowing of the demurrer the cause was out of Court, though before the arguing the demurrer the plaintiff might have amended. †

† Agreeable to what was urged by the Master of the Rolls, it was said by Lord Chancellor *Talbot*, 9 *December* 1736, —— versus *Baines*, that after a demurrer to the whole bill allowed, the bill is regularly out of the Court, and no instance of leave to amend it. (*y*)

(*y*) So Mitford, 13, 175. *Smith* v. *Loaring*, 6 Ves. 773. *Baker* v. *Mellish*, *Barnes*, 1 Dick. 67. But see *Lloyd* v. 11 Ves. 72.

ANONYMUS.

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CASE 84.

Lord Chancellor KING. Where the sheriff has the amercements, as in London, the course was for the Court to grant a messenger to bring in the body on a cepi corpus returned; but now the practice is to deny a messenger, and order the sheriff to bring in the body, else the sheriff to pay the plaintiff all the costs.

MR. *Owen* moved for a messenger upon a *cepi corpus* returned, the process being in *London*, and the return made by the sheriffs of *London* who have (*a*) amercements, and therefore it being a vain thing to amerce, the usual motion in such cases is for a messenger.

But by *Lord Chancellor:* The sheriff having returned that he has this body in his custody, the best way is to move that the sheriff may bring in the body, which if not done forthwith I will order the sheriff to pay the plaintiff all the costs; and by introducing this practice into the Court of Common Pleas, I have prevented this dilatory there; wherefore in order to prevent the like delay in this Court, take an order upon the sheriff that he forthwith bring in the body. (1)

(*a*) Vide *autem* 1 Vern. 116. where Lord Keeper *North* affirms that the officers of the city have no amercements.

(1) Vide *Anon.* Mos. 305. *Anon.* 2 Atk. 507. *Wilkinson* v. *Belsher*, 2 Bro. C. C. 181. (*z*)

(*z*) *Miles* v. *Lingham*, 7 Ves. 230. *Holme* v. *Cardwell*, 3 Madd. 114.

TERM. S. MICHAELIS, 1725.

CASE 85. PRATT *versus* JACKSON.

Lord Chancellor KING: One has a house in which he lives and household goods, and has also a house at Gosport near Portsmouth for invalid seamen, with a vast number of beds, sheets, and household stuff, and by marriage articles it was agreed, that his wife should on his death have no claim upon his personal estate, except his household goods and household stuff: this exception to extend only to the goods which he had in the house in which he lived, and not to such as were in the hospital and made use of by the Government.

UPON the marriage of *Nathaniel Jackson* a freeman of *London* with the defendant his wife, articles were executed by both of them before marriage, by which it was agreed, that in consideration of a provision made for her by the intended husband, the defendant the wife should have no claim out of his real or personal estate, "provided this should not extend to "what he the said intended husband should or might leave her "by will, nor to all or any of the household goods, or utensils, "or household stuff, &c. of him the said *Nathaniel Jackson* "at the time of his death, all which she was to receive and "enjoy."

Jackson the husband at the same time, besides the house at *London* wherein he resided, had an house at *Gosport* near *Portsmouth*, called *Fortune's Hospital*, which was used by the government as an hospital, and *Jackson* provided there a great number of beds and sheets with other furniture in proportion for
[303] the great number of seamen who were invalids, and who by the direction of the government were received and taken care of in this house.

Jackson afterwards died without issue, and his wife claiming these beds and sheets, &c.,

The question was, whether the wife was entitled to these beds, sheets, &c. as household goods or utensils or household-stuff within the intent of the said articles?

Against this demand it was objected, that the household goods intended by these articles must be only such household goods as the testator himself used, and not these beds and sheets which were in nature of a stock in trade, and used at a place where Mr. *Jackson* himself never lived, but the furniture

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was provided and the undertaking carried on by agents and servants only.

That if an upholsterer or pewterer should devise all his household goods, the beds or pewter in his shop would not pass, though in some sense these were household goods; but here only such goods would pass as were generally made use of as household goods in his own house, and not his stock in trade.

Lord Chancellor: Where the meaning is uncertain, the safest way is to follow the letter, and not to wander from thence, which creates the utmost uncertainty, and gives a latitude for the Court to make constructions never perhaps intended to be made by the parties.

The goods in question being beds and sheets are properly household goods; the husband was as well owner of these goods as of the goods in his own house; and there being nothing in the deed which confines the household goods that were to pass to those in his own house, I therefore have no warrant to construe them in that sense.

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Then as both the words and the letter extend to all household goods, and the intention not appearing to have been otherwise, and it being in favour of so near a relation as a wife, I will take the meaning to be as large as the words; so let the wife have the beds, sheets and other furniture used in the hospital.

But upon an appeal to the House of Lords, this decree was reversed. (1)

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(1) 3 Bro. P. C. 199.—And so, *Crichton* v. *Symes*, 3 Atk. 61.—*Le Farrant* v. *Spencer*, 1 Vez. 97. (*z*)

(*z*) *Porter* v. *Tournay*, 3 Ves. 311.

2. Ch. 472.

COLT *versus* NETTERVILL.

CASE 86.

Lord Chancellor KING.

Bill to compel a performance of an agreement for transferring 5000*l.* York-Buildings

THE bill was for a specific performance of an agreement for transferring of some *York-Buildings* stock, and set forth that the defendant *Nettervill* pretending to be possessed of a great quantity of *York-Buildings* stock, and recommending the same to the plaintiff as a rising stock, on the 28th *Sept.* 1724, agreed

stock at 7*l.* 5*s.* per cent. Defendant demurred, but demurrer over-ruled, for the case may be attended with such circumstances as may make it just to decree a specific performance of the parties' own agreement, or at least to pay the difference.

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to sell to the plaintiff 5000*l.* *York-Buildings* stock at 7*l.* 5*s.* per cent. being the then market-price, and the defendant agreed to transfer it to the plaintiff on the 25th of *March* next, on the plaintiff's paying the money, and that the plaintiff agreed to pay 7*l.* 5*s.* per cent. and to accept the transfer, and did thereupon pay to the defendant sixpence earnest.

Also that on the same 28th of *September* 1724, the plaintiff did agree with the defendant to buy another 5000*l.* *York-Buildings* stock at 7*l.* 10*s.* per cent. premium, and to transfer it to the plaintiff on the same 25th of *March* next, on the
[305] plaintiff's paying for the same, that the defendant did agree to make the said transfer accordingly, and the plaintiff also paid sixpence earnest in part of this bargain.

That before the 25th of *March* then next this *York-Buildings* stock rose to 20*l.* per cent. so that the difference beyond what the plaintiff was to pay for the same came to above 1300*l.* Wherefore the bill was to compel the defendant either to transfer the stock to the plaintiff, or pay the difference.

The defendant as to such part of the bill as would compel him to transfer 5000*l.* *York-Buildings* stock at 7*l.* 5*s.* per cent. according to his agreement, demurred, in regard that part of the bill contained no equity, for that the plaintiff might bring his action at law, and on making proper proof would recover his damages, and with the money thus recovered, might himself go to market and buy stock; that one parcel of *York-Buildings* stock was as good and valuable as another, and not like the case of articles for the purchase of lands, where one parcel of land might be more convenient and consequently more valuable to the purchaser than another, for which was cited the case of *Cud* and *Rutter* (*a*), where it was so decreed by Lord *Macclesfield* on an appeal from a decree at the Rolls, though Mr. *Talbot* said this appeared to be a very hard case, where the stock was risen to quadruple the value, and even rose pending the appeal.

(*a*) See this case reported vol. 1. 570.

Lord Chancellor: I do not know but this case may at the hearing appear to be attended with such circumstances that may make it just to decree the defendant either to transfer the
[306] stock according to his express agreement, or at least to pay the difference; therefore I will not allow this demurrer.

As to the other part of the bill, which sought to compel the defendant to transfer to the plaintiff 5000*l.* *York-Buildings* stock at 7*l.* 10*s.* per cent. the defendant pleaded the statute of 29 *Car.* 2. *cap.* 3. *sect.* 17. against frauds and perjuries, whereby (*inter al'*) it is enacted, " that no contract for any

" goods, wares or merchandises of the value of 10*l.* or up-
" wards shall be good, unless the buyer accepts of part of the
" goods, and actually receives the same, or gives something in
" earnest, or unless there be some note in writing signed by the
" party;" and the defendant averred, that he did not accept or receive sixpence or any other money whatsoever, in part or as earnest, and that no part of the stock was delivered or note given.

Whereupon it was argued, that the *York-Buildings* and other stocks were within the words and meaning of the statute of frauds, so as to require either part of the thing contracted to be sold, to be delivered, or a note in writing, or money to be paid as earnest; for

That, 1*st*, This clause of the statute mentioned expressly contracts for the sale of any goods, or merchandises, and that the word *goods* was of a very extensive signification.

2*dly*, That if one having stock should commit felony, this without question would be a forfeiture of his stock, a forfeiture to those who should have a grant of *bona felonum*, so that stock was within the words *bona* or *goods*.

3*dly*, At least it was within the word *merchandise*, for every vendible thing was merchandise; now stock was a thing vendible, and in the year 1720, was the most usual merchandise which people dealt in. [307]

4*thly*, It could be no objection that at the time of making the statute of frauds there was no such stock as *York-Buildings* stock; for suppose the said statute, instead of being made in King *Charles*'s time, had been enacted in the reign of *Philip* and *Mary*, since which time hops came in, and the bargain had been made for hops to the amount of above 10*l.* in money, without writing or earnest; surely such contract had been void; besides this was most plainly within the meaning and mischief of the statute, which intended to prevent rash and precipitate bargains for above the value of 10*l.* and to restrain such bargains as were of value, to the circumstances either of paying earnest, or reducing them to writing.

5*thly*, It was insisted that Lord *Cowper* had determined such a contract for stock to be within the statute of frauds, and that if it exceeded 10*l.* the same ought to be in writing, in regard stocks are goods and merchandises within that statute.

On the other side it was said, that whereas the statute enacts, that no contract should be good for the sale of goods, wares, and merchandises of 10*l.* price, unless part of the goods

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be delivered, or earnest paid, or a note in writing, this shewed that such goods were intended as were capable of an actual delivery, something that was corporeal, and not stock which was incorporeal, nor was there any such thing as *York-Buildings* stock at that time.

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Lord Chancellor: This question was before all the judges of *England*, who were equally divided upon it, six against (1) six, and therefore it is a point too difficult for me to determine upon a demurrer.

The judges equally divided on this question, whether a contract for stock be within the statute of frauds, which mentions goods, wares and merchandises, so as to require the contract to be in writing, or earnest-money to be paid?

It is considerable, that after one *Wolstenholm* was declared a bankrupt as having *East-India* stock, this was reversed by an (*a*) act of parliament, declaring that neither he nor any other person should be liable to bankruptcy, in respect of their having *East-India* stock, so that stocks or the dealing in them will not make a man liable to bankruptcy, nor do they seem to be wares, goods or merchandises within the intent of that clause.

(*a*) Vide 13 & 14 Car. 2. cap. 24.

Buying and selling stock will not make one a bankrupt.

But, further, this plea is not well pleaded; because the bill says, that the plaintiff did pay 6*d.* as earnest, and the plea only says, that the defendant did not *receive or accept* it as earnest; now it is not material how or in what manner the defendant received or accepted it, but how the other paid it, for *quicquid solvitur, solvitur ad modum solventis*, (*z*) and so is *Pinnel*'s case, 5 *Rep.* 117. wherefore the plea was likewise overruled. (2)

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(1) *Pickering* v. *Appleby*, Com. Rep. 354. Sed vide *Crull* v. *Dodson*, Sel. Ca. in Cha. 41. & Reg. Lib. A. 1724, fol. 491.

(2) The plea was ordered to stand for an answer with liberty for the plaintiff to accept. Reg. Lib. A. 1725. fol. 15.

(*z*) See *Devaynes* v. *Noble, Clayton*'s Case, 1st Exception, 1 Mer. 585. *Simson* v. *Ingham*, 2 B. & C. 65. *Wright* v. *Laing*, 3 B. & C. 165. *Shaw* v. *Picton*, 4 B. & C. 728.

YATES *versus* COMPTON.

CASE 87.

Lord Chancellor KING.

Sel. Ca. in Cha. 54. 2 Eq. Ca. Ab. 63. pl. 6. 168. pl. 20. 371. pl. 17. 457. pl. 2.

One devises that his executors should sell his land, and leaves two executors, one whereof dies, and the other renounces, and administration is granted to A. who brings a bill against the heir to compel a sale; whether the renouncing executor in whom this power of sale collateral to the executorship was vested, ought not to be made a party?

A. DEVISED that his executors should sell his land in *Dale*, and with the money arising by that sale and the surplus of his personal estate, should purchase an * annuity of 100*l.* for the life of *Jane Styles*, and should allow to her so much thereof as would maintain her and her children, and gave 30*l.* to each child to be raised out of the said annuity and the personal estate he should die possessed of, and the overplus of his personal estate he gave to *Jane Styles*, and made *B.* and *C.* executors.

The testator died, and *Jane Styles* the intended annuitant died within three months after him; *B.* and *C.* the executors renouncing, administration with the will annexed was granted to the plaintiff who was also the administrator of *Jane Styles* (the intended annuitant) and with the children of *Jane* brought this bill against the heir of the testator, to compel him to join in a sale of these lands in *Dale*. [*309]

For the defendant it was objected, that there wanted parties, in regard the executors ought to have been made defendants, for notwithstanding they had renounced, yet the power of sale continued in them, and was altogether collateral to their executorship. (1)

But there being only a power and no estate devised to the executors, this objection was over-ruled, (*tamen Q.*)

One devises that his executors shall sell his lands, and invest the money in purchasing an annuity for Jane Styles, and gives her the residue of his personal estate; the testator dies, and the annuitant dies three months after the testator; yet the administrator of the annuitant shall compel a sale, and shall have the money arising therefrom, and also the rents and profits till sale.

The plaintiff's counsel then proceeding upon the merits, it was contended on behalf of the heir, that as nothing but a bare power of sale was given to the executors, so such power was for a particular purpose, to buy an annuity for *Jane Styles*, and forasmuch as that purpose could not now be answered, *Jane Styles* being dead, there ought not to be any sale.

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(1) Vide Harg. Co. Litt. 113. a, note (2). (*z*)

(*z*) Sugden, Powers, 107, S. (Ed. 1821.) *Bentham* v. *Wiltshire*, 4 Madd. 238. 44. *Patton* v. *Randall*, 1 Jac. & W. 189. *Tylden* v. *Hyde*, 2 S. & S.

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That this was within the reason of the case where one devises lands for the raising portions for daughters, and the daughters die before they are marriageable, the lands ought not to be sold, but go to the heir at law; so where lands are devised for payment of debts, and the testator himself lives to pay his debts, in such case there shall be no sale; and here it was the same as if the intended annuitant had died in the life of the testator, in which case there should have been no sale, and by the same reason there ought to be no sale now.

That neither *Jane Styles* or her children would be any sufferers by this construction, since if there had been a sale of the lands, and out of the money arising thereby an annuity had been purchased for *Jane Styles*, the same had determined by her death; and the children could be no sufferers, because they were to have their maintenance only out of the said annuity, which would now have been at an end had it been bought.

That out of a very large estate of the testator this farm in question, which was not above 20*l.* per annum, was all that was left for the heir, and if any act of chance or providence should have thrown any pittance upon the heir, it would be hard for the Court to interpose to the prejudice of him who is the favourite of all courts both of law and equity.

But by *Lord Chancellor:* The intention of the will was to give away all from the heir, to turn this land in question into personal estate, and this must be taken as it was at the death of the testator, and ought not to be altered by any subsequent accident. (1)

[311] Then it was insisted that the estate in question descended to the heir at law, for which reason he ought to have the rents till the sale.

But the Court denied this, it being by the will changed into personal estate; and said that if the executors had sold the land within three months after the testator's death, and before the death of *Jane Styles* the intended annuitant, then (probably) the executor of *Jane Styles* should on her death have had the money, or (perhaps) she might in her life-time have come into equity, and have prayed that at least part of the money should have been kept for the children, and not invested in the annuity; nor ought the delay of the executors

(1) Vide *Cruse* v. *Barley*, post. 3 vol. 20.

in not selling the land in question within the said three months to hurt *Jane Styles* the intended annuitant or her children (z). So decreed the land to be sold, (1) and the money arising by the sale as personal estate to be paid to the plaintiff, he paying the children's legacies.

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But the heir at law was ordered his costs. †

† Though by the Register's book the decree appears to have been as here stated, yet it is not mentioned in what right the Court took the plaintiff to be entitled.

(1) " And the heir to join in the sale." Reg. Lib. B. 1725, fol. 242.

(z) *Whitaker* v. *Whitaker*, 4 Bro. 305. *Bayley* v. *Bishop*, 9 Ves. 6. C. C. 36. *Barnes* v. *Rowley*, 3 Ves. *Palmer* v. *Craufurd*, 3 Swan. 482.

LADY DOWAGER ABERGAVENNY, *Jun. versus* LADY DOWAGER ABERGAVENNY, *Senior.*

CASE 83.

Lord Chancellor KING.

2 Eq. Ca. Ab. 69. pl. 5. A defendant having answered the bill cannot afterwards refer it for scandal.

THE plaintiff exhibited her bill against the defendant, and the defendant answered the bill, and the plaintiff moved to refer the answer for scandal and impertinence; whereupon the Master having been attended by counsel, and being about to make his report that the answer was scandalous, the defendant got an order on petition, to refer the bill for scandal; and upon the plaintiff's motion to set aside this order,

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It was objected that though it has been the constant practice, not to refer a bill for impertinency after answer, in regard the defendant by submitting to answer had waived the impertinence, yet as to scandal, the † Court itself was concerned to keep its records clean, and without dirt or scandal appearing thereon, and therefore a bill for scandal might be referred, not only after answer, but after hearing, and even by a third person not party to the suit, (z) and especially in this case where

† For which reason after an order to refer an answer for insufficiency, though it cannot be referred for impertinence, yet it may for scandal, as was determined in the case of *Ellison* versus *Burgess*, *Hill. Vac.* 1729, by Lord Chancellor *King*. (y)

(z) Contra, *Anon.* 4 Madd. 252. But see *Coffin* v. *Cooper*, 6 Ves. 514.

(y) *Pellew* v. ——, 6 Ves. 456.

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both the matters alleged for scandal were relative to the same thing, and the plaintiff proposed that both the scandals should be waived.

Lord Chancellor: If the course has been for so long a time to refer a bill for scandal after the defendant has answered, it is time now to alter it, as occasioning great delays; besides, in the reason of the thing it ought not to be, for when the defendant had submitted to answer the bill, why should he after that procure the bill to be altered, and by that means to be made a new bill?

And though his Lordship seemed to be influenced a little by the objection, that both matters of scandal were relating to things of the same nature, and so properly to be set one against the other, yet he discharged the order for referring the bill for
[313] scandal, intimating that it should be observed as a rule for the future not to refer a bill for scandal after the defendant had submitted to answer it; though it was said by Mr. *Talbot* that it was an argument, the defendant did not move to refer the bill for delay, when he first answered the bill, before he moved to refer it for scandal.

Note this alteration of an old rule of the Court. (1)

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(1) Sed vide contra, *Woodward* v. *Astley*, Bunb. 304. *Anon.* 2 Vez. 631. *Barnes* v. *Saxby*, in Cha. June 21, 1792. *Carrick* v. *London*, in Excheq. July 11, 1792. (*z*)

(*z*) *Ferrar* v. *Ferrar*, 1 Dick. 173. *Anon.* 5 Ves. 656.

Bea. 577.

CASE 89.

COLLINS *versus* GRIFFITH.

Lord Chancellor KING.

2 Eq. Ca. Ab. 168. pl. 19. 188. pl. 2.

Two obligors in a bond bound jointly and severally, and one dies, the executors of the deceased obligor may be sued in equity for the debt without making the surviving obligor a party.

A. B. and *C.* were bound jointly and severally in a bond to *J. S.* *C.* dies, *J. S.* brings a bill against the executors of *C.* for a discovery of his personal estate, and for an account thereof, and to be paid out of assets.

The defendant demurred, and shewed for cause, that it appeared that the bond was a joint bond (which was a mistake, it being joint and several), also for that the other obligors ought to be parties to the suit, and to the account that was to be directed of what was due upon the bond; for perhaps the other obligors might have paid the whole, or at least part of the bond,

and there ought to be but one account taken, otherwise there might be a multiplicity of suits, and the defendant liable to a double account.

Lord Chancellor: This appears to have been a bond, as well several as joint; and as the obligee may sue it severally at law, so may he also in equity; if it were not so, there would be no difference in equity betwixt a joint bond, and one joint and several; and if any of the obligors have paid all or part, the obligor who is sued, or his representative, must bring a bill and have it allowed, and it must also lie upon him (1) to compel the other obligors to contribute towards payment of the debt; the creditor lent his money upon terms to have a security upon which he might sue the obligors severally if he thought fit, and indeed if it were otherwise, that which was intended to strengthen the security would tend to hurt it extremely, for I might not be able to find them all out, and by the same reason that all the obligors are to be sued, if any are dead, their heirs as well as executors are to be made parties, and then, as it would be difficult to commence the suit, so the suit when commenced would be subject to continual abatements, which would be a great difficulty on an honest creditor who has fairly lent his money.

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Whereupon the demurrer was over-ruled with great clearness.

(1) Sed vide *Madox* v. *Jackson*, 3 Atk. 406. (*z*)

(*z*) *Anon.* 2 Freeman, 127. *Blois* v. *Blois*, 2 Vent. 347, 1 Eq. Ca. Ab. 73. pl. 16. *Ashurst* v. *Eyre*, 2 Atk. 51, 3 Atk. 341. *Lawson* v. *Wright*, 1 Cox, 275. *Angerstein* v. *Clark*, 2 Dick. 738, 3 Swan. 147. n. *Cockburn* v. *Thompson*, 16 Ves. 321. *Haywood* v. *Ovey*, 6 Madd. 113. *Bland* v. *Winter*, 1 S. & S. 246.

MOORECROFT *versus* DOWDING.

CASE 90.

Lord Chancellor KING.

2 Eq. Ca. Ab. 746. pl. 3.

By the custom of the manor, copyholds were usually granted for three lives in possession, or for one or two lives in possession, and for two or one life in reversion, making in all three lives, and *A.* being a copyholder for two lives of this manor,

One buys an estate in the name of a trustee, who gives a bond in 200*l.* penalty to assign the estate as the cestui que trust or his executor shall direct. Cestui que trust dies, and his executor brings debt on the bond, and recovers judgment and has the money paid him, after which he brings a bill to have a conveyance of the estate. Trustee decreed to convey to the plaintiff and to account for the profits, but to discount and be allowed the 200*l.* and interest which he paid.

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upon his marriage covenants to surrender his copyhold to the use of himself for life, remainder to his wife for life; and likewise covenants to purchase a reversionary estate for one life in the copyhold, and to surrender the same to such uses as the husband and wife, or the survivor, or the executors or administrators of the survivor, should appoint.

[315] The husband purchases a reversionary life in the copyhold expectant on the death of the two lives, and purchases it in the name of a third person, who gives a bond in 200*l.* penalty to the husband, to surrender the copyhold upon request to such person and uses, as the husband and wife or the survivor, or the executors or administrators of the survivor should appoint.

The husband and wife died, and the administrator bringing an action upon the bond against the trustee, recovered judgment for the 200*l.* penalty, and had the money paid him, but yet afterwards brought this bill against the trustee, to compel him to surrender the copyhold to the use of the plaintiff.

Insisted for the defendant, that this bill did not lie, in regard the 200*l.* the penalty of the bond was a stated damage for the breach of trust, and that the plaintiff had his election either to bring his bill to have the copyhold and a specific execution of the trust, or might if he pleased sue the bond and content himself with the penalty; but that there was no colour of reason, that the plaintiff should recover the 200*l.* on the bond and the copyhold too, which he was now endeavouring to do.

Lord Chancellor: There is no reason that the plaintiff should have the 200*l.* on the bond and the copyhold likewise; but the defendant being a plain trustee, and continuing a trustee for the plaintiff, until he has performed the trust must account for the profits to the plaintiff, who has in equity a specific right to the land, (*z*) but in that account the 200*l.* and interest must be deducted, and the defendant the trustee to have an allowance for the same. (1)

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(1) Reg. Lib. B. 1725, fol. 76. It appears that the defendant expressly insisted by his answer that he ought not to be doubly vexed by being sued in equity after having been compelled to pay the penalty of the bond at law; but nevertheless it was decreed as above.

(*z*) See *Hobson* v. *Trevor*, ante, 193.

2. Tu. Ca. 242.
1. Bea. 69.
4. Tu. Ca. 401.
37. G. 416.
3. Eq. 268.

BENNET *versus* DAVIS.

CASE 91.

At the Rolls. 2 Eq. Ca. Ab. 114. pl. 6. One devises lands in fee to his daughter being a feme covert for her separate use, without appointing any trustees; the husband is a tradesman and becomes a bankrupt, yet the devised premises not subject to the bankruptcy.

J. S. having married his daughter to one *Bennet* a tradesman in *London*, who was extravagant and in debt, the father makes his will, and devises the premises in question (being lands in fee) to his daughter (the wife of *Bennet*) for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived, but that they should upon the wife's death go to her heirs.

Soon after this the testator dies, and *Bennet* the husband becoming a bankrupt, the commissioners assign the lands in question (being the lands thus devised) to the defendant *Davis* in trust for the creditors; and upon *Davis*'s bringing his ejectment, the bankrupt's wife by her next friend prefers her bill against *Davis* the assignee and her husband, in order to compel them to assign over this estate to her separate use.

It was objected on behalf of the defendant the assignee, that he being a creditor, and having the law on his side, it would be hard to take the benefit of the law from him; and that though the testator might intend these lands for the separate use of the daughter, yet that such his intention was not executed according to law; forasmuch as by law the husband during the coverture was entitled to the wife's estate in her right; and though the testator might have devised the premises to trustees for the separate use of the wife, yet the question now was, not upon what he *might* have done, but upon what in fact he *had* done; and I mentioned the case of *Harvey* and *Harvey*, vol. 1. 125. where a man had devised goods of value to his daughter [317] a feme covert for her separate use, and it not being to trustees, Lord *Cowper* apprehended it to be a case of difficulty, but declared his present thoughts were that the intention of the testator was against the rule of law, and void; and I urged, that the case of a devise of a legacy, or of a term to the wife for her separate use might be good, because these remained in the executor until assent, and equity would not compel the executor to assent, whereby the intention of the testator should be disappointed, but would continue the executor a trustee for the feme covert; whereas in the present case, the devise being of lands in fee to the wife herself, who by virtue of the

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will only, had an immediate title thereto, the husband must consequently be entitled to the profits in her right, and it would be repugnant to the law to say, that he should not take the profits.

That here was no trust, the testator never having intended to trust the husband, and the wife could not be a trustee for herself; besides the husband could not properly be a trustee for the wife, they both being but one person.

That all this strained construction was to do that which was against common right, (viz.) to create a separate property in a feme covert; and I put this case:

Suppose I should have rent-charge in fee, and my son had the land subject to the rent-charge, which should amount to near the value of the land, after which I should devise the rent-charge to my son (who had the land) and say by my will
[318] that the rent should not be subject to the debts of my son, in this case the rent would be subject to his debts, in regard it would be merged, and yet this rent might have been given to trustees.

On the other hand the plaintiff's counsel would have read parol evidence to prove, that the testator did not intend these lands should be liable to the husband's debts.

But the Court would not permit such evidence to be read, it being in the case of a devise of land, which by the statute must be all of it in writing.

As to the chief point, the *Master of the Rolls* took it to be a clear case, that it was a trust in the husband, and that there was no difference, where the trust was created by the act of the party and where by the act of law.

If I should devise that my lands should be charged with debts or legacies, my heir taking such lands by descent would be but a trustee, and no remedy for these debts or legacies but in equity; so in the principal case, there being an apparent intention and express declaration, that the wife should enjoy these lands to her separate use, by that means the husband, who would otherwise be entitled to take the profits in his own right during the coverture, is now debarred, and made a trustee for his wife.

And admitting the husband to be a trustee, then the argument of the creditors having the law of their side was immaterial; as if the bankrupt had been a trustee for *J. S.* his bankruptcy should not in equity affect the trust-estate; and that in
[319] this case, though the husband the bankrupt might be tenant by

the curtesy, yet he should be but a trustee for the heirs of the wife. (z)

Also when the testator had a power to devise the premises to trustees for the separate use of the wife, this Court, in compliance with his declared intention, will supply the want of them, and make the husband trustee; and the defendant the assignee, who claiming under the husband can have no better right (1) than the husband, must join in a conveyance to a trustee, for the separate use of the wife.

Which was decreed accordingly. (2)

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(1) Vide *Jacobson* v. *Williams*, ante, 1 vol. 382. *Bosvil* v. *Brander*, ante, 1 vol. 458.

(2) Reg. Lib. A. 1725, fol. 127.

Et vide *Rolfe* v. *Budder*, Bunb. 187. *Darley* v. *Darley*, 3 Atk. 399. *Haselinton* v. *Gill*, 3 T. R. 620. note. *Lee* v. *Prieaux*, 3 Bro. C. C. 381. (y)

(z) See *Morgan* v. *Morgan*, 5 Madd. 411.

(y) *Slanning* v. *Style*, post, 3 vol. 338. *Dixon* v. *Olmius*, 2 Cox, 414. *Doe* v. *Martin*, 4 T. R. 64. *Lumb* v. *Milnes*, 5 Ves. 517. *Rich* v. *Cockell*, 9 Ves. 369. *Adamson* v. *Armitage*, Coop. 283, 19 Ves. 416. *Ex parte Ray*, 1 Madd. 199. *Wills* v. *Sayers*, 4 Madd. 409. *Roberts* v. *Spicer*, 5 Madd. 491. *Prichard* v. *Ames*, 1 Turner, 222.

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TERM. S. HILLARII, 1725.

2. Keen, 656.
26. Ch. D. 602.
32. —— 414.
1907. 2. K. B. 891

DOUGHTY *versus* BULL.

CASE 92.

Lord Chancellor KING.

One devises lands to trustees in fee in trust to apply the profits until sale, for the benefit of all his children, and on further trust, that as soon as the trustees shall see necessary for the benefit of the children they should sell the premises and apply the money for the benefit of his four children, equally to be paid at twenty-one or marriage; A. the eldest of the four children attained twenty-one and married and died without issue intestate, leaving a wife. Decreed the land being in all events devised to be sold, though the time for sale was left to the executors, was personal estate, and A.'s widow must have a moiety of A.'s share, and the profits of the land until sale must go as the money arising upon sale would.

ROBERT *Doughty* the plaintiff's father being seised in fee of lands in *Lincolnshire*, devised the same to trustees (his wife and son-in-law) and their heirs in trust to apply the rents and profits thereof until sale, for the benefit of all his children, *A. B. C.* and *D.* and the survivors and survivor of them equally

DOUGHTY *v.* BULL.

part and share alike, and on further trust, that as soon as the trustees should see necessary for the benefit of the children, they should sell the premises and apply the monies for the benefit of his children part and part alike, the shares of the sons to be paid at twenty-one, and those of the daughters at twenty-one, or marriage. (1)

A. the eldest son attained his age of twenty-one and died without issue and intestate, leaving a wife, upon which the

[321] plaintiff *B.* as heir brought a bill against the trustees, praying that they might convey to the plaintiff the deceased brother's share of the fee simple and inheritance of these lands, and likewise for a share of the rents and profits of the premises that had been received by the trustees.

The *Master of the Rolls* decreed, that the lands being devised to be sold were thereby rendered personal estate, and that all the children were tenants in common, as well of the rents and profits accrued before the sale, as of the money arising by the sale, and that the wife of the deceased son should have a moiety of the said deceased son's share as well of the rents received in her said husband's life-time as of his share of the monies which were to arise by the sale. Upon which an appeal was brought before Lord Chancellor *King*, and it was objected that as to the rents accrued in the life of the eldest son, who was dead, these rents being directed to be for the benefit of all the children and the survivors and survivor of them, they were jointenants thereof, for which reason the widow of the eldest son should not have a share upon the statute of distribution. and the subsequent words *equally to be divided part and share like*, being only words of implication, and such as in a deed would not make a tenancy in common (*a*) must give way to the express words by which these rents were directed to go to the survivor.

(*a*) Vide ante 282.

Lord Chancellor: The rents before the sale were to go in the same manner as the monies arising by the sale, and all was to go in common.

[322] As to the other point (which was the chief) it was objected, that this question was now purely betwixt the heir and administrator, whether upon the words of the will this land was turned into personal estate or not? that the eldest son who was

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(1) "And if any of his said children "should die before their shares became "due, then such share should be paid "to the survivor or survivors of such "children, equally part and part alike "at the times aforesaid." Reg. Lib. A. 1723, fol. 558.

dead had left no creditor, and that the land was not absolutely and indefinitely directed to be sold, but as soon as the trustees should see it necessary for the benefit of the children; and the trustees being made defendants did by their answer upon their oaths say, that they thought it was not for the benefit of the children, that the land should be sold; that the rest of the children were infants, and could not judge one way or other; and in point of reason it seemed not to be for the benefit of the children (at least as yet) to have a sale; for at present the children's provision was safer, while secured by *terra firma*, than when turned into money, which might lie dead and yield no profit; and if put out, might be lost upon an ill security; whereas while it continued upon land, it could not be lost; and though it was true, that (regularly speaking) lands devised to be sold are thereby turned into money, and construed in equity as personal estate, yet that was not so in all cases; as suppose lands were devised to be sold for payment of debts, and on the testator's death it should appear, that the debts might be paid in a reasonable time out of the profits, or by a sale of a small part only of the estate; in the one case no part of the land, and in the other but a sufficient part thereof should be sold, (1) and this in favour of the heir; so in the principal case, in favour of the heir and against the administrator; the land not being as yet sold, nor thought proper to be sold by the trustees, nor decreed to be sold by the Court in the life of the eldest son, it ought as to the eldest son at least to be esteemed, as in fact and truth it was, a real estate. [323]

Lord Chancellor; The rule being, that lands devised to be sold are thereby made personal estate, this case is within such rule; the lands are here devised to be sold, and only the time of the sale left to the discretion of the trustees; wherefore this case being within the general rule, must be determined accordingly.

Affirm the decree.

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(1) Vide *Cruse* v. *Barley*, post. 3 vol. 20.

CASE 93. STEPHENS *versus* STEPHENS.

Lord Chancellor KING.
2 Eq. Ca. Ab. 367. pl. 10.
A devise that if cestui que vie of a church-lease which the testator had should die, the testator's executors should purchase the premises for the life of J. S. the testator's kinsman,
but if such purchase could not be made, then the surplus of his personal estate to go to another; whether J. S. takes any interest by the will.

ONE seised of a leasehold estate for the life of *A.* held of the church, makes his will, and after several legacies devises an annuity out of the leasehold premises to *B.* for his life, and directs that if *B.* survives *A.* (the *cestui que vie* in the lease) then the testator's executor shall purchase the leasehold premises for the life of *C.* the testator's kinsman; and then devises that his executor out of the surplus of the leasehold and personal estate shall keep the premises in repair; but if the leasehold premises could not be so purchased, then he devises the surplus of the estate to the plaintiff, and makes *J. S.* his executor in trust only, giving him a small legacy.

The executor purchased the leasehold premises for the life of *C.* and the question was, whether the plaintiff or the defendant *C.* was entitled to the surplus of the profits thereof?

For the plaintiff it was urged by the Solicitor General that as, if the lease could not be purchased for *C.*'s life, the plaintiff was then to have that money with which the purchase was to
[324] have been made, so now the lease was purchased with the testator's money, the plaintiff ought to have this lease, and that the testator must intend so, otherwise he would have given the money, if not laid out in the purchase, to the defendant *C.* which the will had not done; that it was a very idle pretence for *C.* to claim the lease for no other reason but because he was one of the lives for which the lease was taken, which could relate only to the duration of the lease, and did not import any benefit to the defendant. Also if there was no disposition of the lease by the will, then the testator would have died intestate as to this lease, and consequently it must have gone to his next of kin, according to the statute of distribution of intestates estates.

Lord Chancellor: The plaintiff cannot have this lease, the devise to him being upon a contingency which never happened, (viz.) if the leasehold premises could not be purchased for the life of the defendant, whereas such purchase has been made by the executor.

2*dly*, The executor cannot claim the lease, he being only executor in trust, and having an express legacy, neither does he in fact lay claim to the same.

3*dly*, The next of kin will not be entitled thereto, it ap-

pearing that the testator did not intend to die intestate as to any part of his estate. But,

4thly, The defendant *C.* is the person entitled to the leasehold premises, this being the case of a Western manor where it is the usual way to put in a son's, a daughter's or a wife's life, by which it is meant to give the estate to such a son or daughter, &c. and this the rather appears to have been a beneficial devise, because in the devising clause the testator calls the defendant *his kinsman*, and here slighter words will serve to give the leasehold premises to the defendant, forasmuch as no other person can take them, and it is a dark will. [325]

But afterwards upon a rehearing for the reasons given by the Solicitor General, the Chancellor reversed his former decree, and held that by this will the plaintiff was entitled to the lease. (1)

(1) Reg. Lib. B. 1725. fol. 454.

EDEN *versus* FOSTER.

CASE 94.

THE free grammar school of *Birmingham* was founded by King *Edward* the 6th, who endowed the said school, and by his letters patent appointed perpetual governors thereof, who were thereby enabled to make laws and ordinances for the better government of the said school, but by the letters patent no express visitor was appointed, and the legal estate of the endowment was vested in these governors.

Lord Chancellor KING, Lord Chief Justice EYRE, Lord Chief Baron GILBERT.

Gilb. Eq. Rep. 178.
Sel. Ca. in Cha. 36.

2 Eq. Ca. Ab. 199. pl. 5. The King founds a school, and endows it, and appoints governors who have the legal estate of the endowment vested in them, and there are no express words appointing them visitors; resolved a commission may issue to visit and call to an account these governors.

After a commission had issued under the great seal to inspect the management of the governors, and all the exceptions being already heard and over-ruled, it was now objected to this commission, that the King having appointed governors, had by implication made them visitors likewise, the consequence of which was, that the Crown could not issue out a commission to visit or inspect the conduct of these governors, according to the express words of Lord *Coke* in 10th *Report*, 31. *a.* the case of *Sutton*'s hospital.

The matter first came on before Lord Chancellor *Macclesfield*, and afterwards before Lord *King*, who desired the assist- [326]

EDEN *v.* FOSTER.

ance of Lord Chief Justice *Eyre*, and Lord Chief Baron *Gilbert*, and accordingly the opinion of the Court was now delivered *seriatim*, that the commission was good.

1*st*, It was laid down as a rule, that where the King is founder, in that case his Majesty and his successors are visitors; but where a private person is founder, there such private person and his heirs are, by implication of law, visitors.

2*dly*, That though this visitatorial power did result to the founder and his heirs, yet the founder might vest or substitute such visitatorial right in any other person or his heirs.

3*dly*, They conceived it to be unreasonable and of mischievous consequence, that where governors are appointed, these, by construction of law, and without any more should be visitors, should have an absolute power, and remain exempt from being visited themselves. And therefore,

4*thly*, That in those cases where the governors or visitors are said *not to be accountable*, it must be intended, where such governors have the power of government only, and not where they have the (*a*) legal estate and are intrusted with the receipt of the rents and profits, (as in the present case) for it would be of the most pernicious consequence imaginable, that any person intrusted with the receipt of rents and profits, and especially for a charity, though they * misemploy never so much these rents and profits, should yet be unaccountable for their receipts; this would be such a privilege as might of itself be a temptation to a breach of trust. (*z*)

(*a*) Vide Duke'sCharitable Uses, page 68. cap. 6. the case of the hospital of Sutton-Coldfield, and the like determination in the case of Hynshaw and Pydwers versus the Mayor and Corporation of Morpeth, Duke's Ch. 69. which the Chancellor and Chief Baron cited on this occasion and affirmed to be law.

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5*thly*, That the word [governor] did not of itself imply visitor; and to make such a construction of the word against the common and natural meaning of it, and when such a strained construction could not be for the benefit, but rather to the great prejudice of the charity, would be very unreasonable; besides, it would be making the King's charter operate to a double intent, which ought not to be.

(*z*) *Attorney General* v. *Lock*, 3 Atk. 164. *Green* v. *Rutherforth*, 1 Ves. 462. *Attorney General* v. *Middleton*, 2 Ves. 327. *Attorney General* v. *Corporation of Bedford*, 2 Ves. 505. *Attorney General* v. *Governors of Foundling Hospital*, 2 Ves. jun. 42. *Attorney General* v. *Dixie*, 13 Ves. 519. *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305. *Attorney General* v. *Lord Clarendon*, 17 Ves. 491. *Ex parte Berkhampstead Free School*, 2 V. & B. 134.

EDEN *v.* FOSTER.

A power may be given to commissioners to make bye-laws to regulate the charity, but where the power given to such commissioners to make bye-laws is too extensive, it will be void only pro tanto.

6*thly*, Whereas it had been objected that the commissioners by this commission had a power given them to make bye-laws, by virtue whereof such bye-laws might be made as would destroy even the directions of the original founder, and the very end of the charity:

To this it was answered, that the power given to these commissioners for the making of bye-laws must be intended for the better regulating and preserving the charities given, and not for the perverting or overturning them; and if the letters of commission gave any larger power, they would be void only *pro tanto;* though it was observed with regard to the powers given by the present commission, that they did not differ from several precedents of the like nature, which were all penned in the same manner; as for instance, in the cases of *Winbourne*, *Basingstoke*, and *Plymouth* schools, in all which governors were appointed, but yet these schools are, and have been visited; so that the objection was over-ruled, and the commission under the great seal resolved to be well issued.

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1. Russ. & Mu. 642.
5. Sim. 530.
5. — 548.
2. Keen. 226.

SIR BARNHAM RIDER *versus* SIR CHARLES WAGER & al', & e cont.'

CASE 95.

1 Turner & Ru. 70

Lord Chancellor KING.

2 Eq. Ca. Ab. 569. pl. 5. 773. pl. 16.

ADMIRAL *Littleton*, by will dated 18 *March* 1713, devised to his wife six houses in *Bury-street*, *London*, in the possession of ——— in bar of dower, and subject to his legacies devised to his eldest daughter and her heirs one moiety of his real estate, as also one moiety of his personal estate, and devised to his younger daughter and her heirs the other moiety of his real estate and also of his personal estate; he devised to his godson *James Masters* second son of Sir *Harcourt Masters* 500*l.* part of the money owing to him by Sir *Harcourt;* the rest of the money owing to him by Sir *Harcourt* he gave to and amongst all the rest of the younger children of Sir *Harcourt*, the same to remain in Sir *Harcourt*'s hands until the children should be capable of receiving it; and the legacy or share of any of them dying before such time, to go to the survivors and survivor of them.

Afterwards the testator married his eldest daughter to the plaintiff Sir *Barnham Rider*, giving with her a portion of 5000*l.* in money, and previous to that marriage, by articles dated the

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28th of *October* 1717, covenanted to settle one moiety of all his real estate to the use of himself for life, remainder to Sir *Barnham* and his intended wife for their lives, remainder to the younger children of the marriage in tail general, remainder to Sir *Barnham* in fee, and also covenanted, that he would stand possessed of one moiety of all such personal estate as he should [329] leave at his death, (subject only to his debts and such legacies as should amount to 5000*l.*) in trust for Sir *Barnham* and his said intended wife for their lives, and afterwards to be paid to their younger children.

Subsequent to this the testator made a codicil to his will, thereby reciting, that he had by deed dated the same day, pursuant to a power, limited a jointure of 400*l.* per annum to his wife for her life in bar of dower, and then gave his *South-sea* stock (being about 3000*l.*) to his youngest daughter, and confirmed his former will subject to the articles made on the marriage of his daughter to Sir *Barnham Rider;* and the testator having a debt due to him from one *Batson* his brother-in-law of 300*l.* by his codicil devised to this *Batson* the money owing from him to the testator.

After the making of this will and codicil, the testator and his wife mortgaged the said estate to one *Clayton* for 3000*l.* about which time Sir *Harcourt Masters*, who at the making of the will was indebted to the testator in about 1000*l.* did at the testator's desire pay in this 1000*l.* unto the testator.

Also *Batson* acquainting the testator that he would pay him in his debt, the testator thereupon ordered his agent to receive the same from *Batson*, but to take no interest.

After the making of this will, and in the life-time of the testator, the second son of Sir *Harcourt Masters* died, but Sir *Harcourt*'s other younger sons were then living, and made plaintiffs in the cross cause.

[330] Hereupon the questions were, 1*st*, whether the younger children of Sir *Harcourt Masters* were entitled to any part of the 1000*l.* debt given them by the will, but received by the testator after the making thereof.

A. having a debt due to him from J. S. devises 500*l.* of it to B. and the residue of it to C. but does not mention what the debt is which is owing from J. S. A. receives the whole debt in his life-time, B. dies in the testator's life-time: the testator's receiving in the debt in his own life-time is an ademption of the legacy, as to the devise of the residuum of the debt; but it may be otherwise as to the certain legacy given to B. if B. had survived the testator.

A. devises 500*l.* legacy to the second son of J. S. and devises other legacies to the other sons of J. S. and declares, that if any of the younger sons of J. S. should die before they are capable of receiving their share, the share or legacy of him so dying shall go to the survivor; the second son dies in the testator's life-time, this 500*l.* given to the second son shall not survive.

And as to this it was argued, that with respect to the 500*l.* part of the said debt given by the testator to the second son of

Sir *Harcourt*, if the second son had survived the testator there might have been some reason, that though the testator after the making of his will had received the same, yet the second son of Sir *Harcourt* should be entitled thereto, because it was a certain (1) sum of 500*l.* which was given by the will to the said second son; and where a certain sum is given out of any fund, if the testator himself in his life-time receives it, whereby his personal estate is increased, this must be made good to the legatee out of some other part of the personal estate; but where the thing given is specific, (viz.) such a debt, or the residue of the said debt, and the testator himself afterwards receives in this debt, as the devise is specific, and the thing *in specie* by the act of the testator does not continue to have any subsistence, this is properly and reasonably an ademption of the legacy; and that it is a material distinction where the testator (2) himself calls in a debt which he has devised by his will, and where the debtor unprovoked or uncalled upon pays it in; for in the latter case it cannot be said to be the act of the testator, and therefore would be no ademption nor revocation of the will; but in the former case (and which was the present case) the admiral called for the debt from Sir *Harcourt*, and having received it, and the legacy of the residue to the younger children of Sir *Harcourt* being specific, the testator himself had by his own act put an end to the legacy and extinguished the same.

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And though objected that by this will it was declared, that if any of the younger children of Sir *Harcourt Masters* should

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(1) As to this distinction, vide *Savile* v. *Blacket*, ante 1 vol. 779. *Attorney General* v. *Parkin*, Amb. 566. *Ellis* v. *Walker*, Amb. 309. *Backwell* v. *Child*, Amb. 260. *Ashburner* v. *Macguire*, 2 Bro. C. C. 108. *Badrick* v. *Stevens*, 3 Bro. C. C. 431. (*z*)

(2) So, *Orme* v. *Smith*, 1 Eq. Ca. Ab. 302. pl. 2. *Crockat* v. *Crockat*, ante 165. *Birch* v. *Baker*, Mos. 373. *Partridge* v. *Partridge*, Ca. temp. Tal. 228. Sed contrà, *Earl of Thomond* v. *Earl of Suffolk*, ante, 1 vol. 464. *Ford* v. *Fleming*, post. 469. *Ashton* v. *Ashton*, post. 3 vol. 386. *Drinkwater* v. *Falconer*, 2 Vez. 623. *Attorney General* v. *Parkin*, Amb. 566. *Hambling* v. *Lister*, Amb. 401. *Ashburner* v. *Macguire*, 2 Bro. C. C. 108. *Humphreys* v. *Humphreys*, in Cha. 24 July, 1789. (*y*)

(*z*) *Simmons* v. *Vallance*, 4 Bro. C. C. 345. *Roberts* v. *Pocock*, 4 Ves. 150. *Chaworth* v. *Beech*, ib. 555. *Innes* v. *Johnson*, ib. 568. *Kirby* v. *Potter*, ib. 748. *Raymond* v. *Brodbelt*, 5 Ves. 206. *Barton* v. *Cooke*, 5 Ves. 461. *Sibley* v. *Perry*, 7 Ves. 522. *Webster* v. *Hale*, 8 Ves. 410. *Deane* v. *Test*, 9 Ves. 146. *Wilson* v. *Brownsmith*, 9 Ves. 180. *Lambert* v. *Lambert*, 11 Ves. 607. *Gillaume* v. *Adderley*, 15 Ves. 384. *Smith* v. *Fitzgerald*, 3 V. & B. 2.

(*y*) 2 Cox, 184. See the later cases in Note to *Lord Thomond* v. *Lord Suffolk*, 1 vol. 462.

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die before they were capable of receiving their share, then the share or legacy of him or her so dying should go to the survivors or survivor;

Yet the Court took it, that this must be intended if the legatee should have survived the testator, so that the right to the legacy became vested in him, and that in such case only the survivor should take; but that where the legatee died in the life of the testator, as nothing could ever vest in the legatee, so neither could it survive (1) from him; but at the same time the Court admitted, that where a devise is to *A.* for life, remainder to *B.* and *A.* dies in the testator's life-time, *B.* shall take presently; or if a devise be to *A.* (*a*) and *B.* and *A.* dies in the testator's life-time, and then the testator dies, there *B.* shall have the whole; for these cases seem to be within the plain intention of the testator; but in the principal case it was quite a strain, to support a legacy given out of a fund which the testator himself had by his own voluntary act put an end to; for which reason *Lord Chancellor* declared that all these legacies to the younger children of Sir *Harcourt Masters* were extinct, and should not be made good; and upon this point were cited *Raymond* 335. *Paulet*'s case, *Swinbourne* 7 *part, cap.* 20, 447, and the case of (*b*) *Orm* v. *Smith.*

(*a*) Show. 91. Salk. 238.

(*b*) 2 Vern. 681. 1 Eq. Ca. Ab. 302.

B. owes A. a debt, A. by will gives the debt to B. and afterwards receives it himself in his life-time; this is an ademption of the legacy.

* 2*dly*, As to the point where the testator devised to *Batson* the money which he owed to the testator, and which he afterwards himself received, *Lord Chancellor* said this also was clear; for though the evidence was not so strong as to the testator's calling in the money, yet there did not appear to have been any intention in him to forgive any thing but the interest of this debt, and that this was intended to be no more than a release by a will, which though not in (2) strictness a release (for it being by will could operate only as a legacy, and must be assets, and liable to pay the debts of the testator) yet it seemed only intended as a release by his will, which intention was altered by the testator's consenting in his life-time to receive the debt himself, and the will intimated no more than that the testator's executors should not after his death give any trouble or molestation to *Batson* for this debt; and therefore as to this legacy claimed by *Batson*, the Court declared that it was also extinct.

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(1) Sed vide *Perkins* v. *Mickle-thwaite*, ante, 1 vol. 274. *Willing* v. *Baine*, post. 3 vol. 113.

(2) Vide *Elliot* v. *Davenport*, ante, 1 vol. 83. *Sibthorp* v. *Moxom*, 3 Atk. 580.

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The next point was concerning the moiety of the real estate of Admiral *Littleton*, which he covenanted to settle to the use of himself for life, remainder to the use of Sir *Barnham Rider*, *&c.*

One devises to his wife six messuages, and the rest of his real estate equally to his two daughters in fee, and afterwards on the marriage of his eldest daughter he covenants to settle one moiety on her and her husband; the devise of the six houses shall be good, and subsist out of the remaining moiety.

And it was insisted, and so held by the Court, that though this was but a covenant, and therefore at law no revocation of the will by which the testator had disposed of his real estate, yet that the same being for a valuable consideration, was in equity *tantamount* to a conveyance, and consequently in equity (1) a revocation of the will, as to the moiety of the six houses * devised by the testator to his wife; so that the plaintiff Sir *Barnham Rider* was entitled to one clear moiety of the real estate, and to an account of the rents and profits thereof from the death of the testator. But,

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As to the six houses devised to the testator's wife, it being the testator's intention that she should have them, the Court held that she should have a satisfaction out of the remaining moiety, and that the wife should not suffer by the marriage-articles, there being enough out of the other moiety to supply and satisfy the devise of the six houses to her; although on the other side it was objected, that the wife having a jointure of 400*l.* per annum made to her, there was the less reason for the Court to strain any thing in her favour against the co-heir the youngest daughter, who was left but indifferently provided for, the remainder of this 400*l.* per annum jointure being to go over, after the jointress's death, to collateral heirs male.

A. has two daughters, B. and C. and devises one moiety of his real and personal estate to B. the other moiety of his real and personal estate to C. and afterwards A. in consideration of marriage covenants to settle a moiety of his real estate upon the husband that marries B. the husband shall have one moiety by the settlement, and the wife the moiety of the other moiety by the will.

In the next place, as to the other moiety of the real estate, it was decreed, that the testator's widow was to have for her life six houses part thereof, and the residue of such moiety subject to the wife's estate for life in the six houses, to be divided in moieties, one moiety thereof to go to the elder daughter, and the other to the younger; and though it was insisted, that it appeared to be the plain intention of the testator that both

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(1) So, *Cotter* v. *Layer*, post. 624. (*z*)

(*z*) *Brydges* v. *Duchess of Chandos*, 2 Ves. jun. 436. *Knollys* v. *Alcock*, 5 Ves. 654, 7 Ves. 564, Sugden, Vendors, 166, (edit. 5th.) *Vawser* v. *Jeffery*, 16 Ves. 526, 2 Swan. 268. *Bennett* v. *Earl of Tankerville*, 19 Ves. 178. *Rawlins* v. *Burgis*, 2 V. & B. 387.

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daughters should have equal portions by the 5000*l.* in money given to the eldest daughter on her marriage, and the 5000*l.* which the testator reserved power to dispose of in legacies by his will, and that it was a very (*a*) common case, where a man by will gives a portion of 1000*l.* to one of his daughters, and afterwards lives to marry that daughter, and gives her 1000*l.* or some greater portion, to construe such portion to go in satisfaction and discharge of the legacy, it being as if the testator had himself paid his own legacy in his life-time; and that it was within the same reason in the present case, where the testator by his will gave a moiety of his real and personal estate, to his eldest daughter, and afterwards in his life-time upon her marriage, gave her a moiety of his real and personal estate, that this should be a satisfaction and payment of the legacy: (1)

(*a*) 2 Vern. 115. Preced. in Chan. 183.

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Yet to this the *Lord Chancellor* said, that though it might be the intention of the testator, it was nevertheless going too far from plain words; and this case was the stronger, in regard that after the testator had entered into these articles for the giving half his real and personal estate to the plaintiff Sir *Barnham Rider*, he executed a codicil whereby he confirmed his will subject to the articles; which confirmation was a republication (2) of his will, and as if he had wrote it over again, or had afterwards for a valuable consideration assigned over a moiety of his real and personal estate to his eldest daughter, by which the said moiety thus disposed of did no longer continue any part of the testator's estate, so that the testator afterwards by devising a moiety of his real and personal estate, must be intended to have meant the remaining moiety only, and to have divided that moiety into moieties.

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(1) Vide *Hartop* v. *Whitmore*, ante, 1 vol. 681.

(2) Vide *Acherley* v. *Vernon*, Com. Rep. 381. and 3 Bro. P. C. 107. *Potter* v. *Potter*, 1 Vez. 437. *Gibson* v. *Lord Montfort*, 1 Vez. 485. (*z*)

(*z*) S. C. nom. *Gibson* v. *Rogers*, Amb. 93. *Jackson* v. *Hurlock*, 2 Eden, 263. *Barnes* v. *Crowe*, 4 Bro. C. C. 2. 1 Ves. jun. 486. *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138. *Strathmore* v. *Bowes*, 7 T. R. 482. *Bowes* v. *Bowes*, 2 Bos. & P. 500. *Pigott* v. *Waller*, 7 Ves. 98. *Holmes* v. *Coghill*, 7 Ves. 499. *Broome* v. *Monck*. 10 Ves. 597. *Goodtitle* v. *Meredith*, 2 M. & S. 5. *Hulme* v. *Heygate*, 1 Mer. 285. *Rowley* v. *Eyton*, 2 Mer. 128. But in *Izard* v. *Hurst*, 2 Freem. 224, such a republication was held not to set up a legacy which, as in the principal case, had been satisfied by a portion. And see *Monck* v. *Lord Monck*, 1 Ba. & Be. 306.

5thly, It being urged that the testator Admiral *Littleton* and his wife having joined in the mortgage by lease and release and fine, this was a revocation of the admiral's will:

One by deed and fine mortgages, this a revocation of a will only pro tanto.

Lord Chancellor replied, that it could only be a revocation *pro tanto*. (1)

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6thly, It was contended that this mortgage being a debt, must be paid out of the personal estate, nay that it should be paid out of the personal estate prior to the specific legacies, at least before the pecuniary legacies, and it was said to have been determined, (*a*) that a mortgage should be paid out of the personal estate, in preference to the customary or orphanage part by the custom of *London*; which last was admitted by the Court, because the custom of *London* cannot take place till after the debts paid, however it was afterwards admitted by counsel on both sides, that the land being made by the testator himself a fund for the payment of the mortgage-money, though the same should be eased against an administrator or residuary legatee, yet it should not be eased so as to disappoint any of the debts, or even (2) legacies given by the will, either specific or pecuniary.

The personal estate of a freeman shall be applied to pay mortgages, preferably to the customary or orphanage part, so against a residuary legatee, but not against a pecuniary or specific legatee.

(*a*) This was determined in the case of *Ball* v. *Ball*, by Lord *Macclesfield* in 1720.

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(1) So, *York* v. *Stone*, 1 Salk. 158. *Perkins* v. *Walker*, 1 Vern. 97. *Hall* v. *Dench*, 1 Vern. 329. 342. *Parsons* v. *Freeman*, 3 Atk. 748. (*y*)

(2) So, *Tipping* v. *Tipping*, ante 1 vol. 729. *Davis* v. *Gardiner*, ante 190, &c.

(*y*) S. C. Amb. 115. *Sparrow* v. *Hardcastle*, 3 Atk. 798. Amb. 224. Kenyon, 70. *Tucker* v. *Thurstan*, 17 Ves. 133. *Cholmondeley* v. *Clinton*, 2 Jac. & W. 178, 9. So a conveyance in fee to trustees to raise money to pay debts is in equity only a revocation *pro tanto*. *Vernon* v. *Jones*, Pre. Ch. 32. *Ogle* v. *Cooke*, cited in *Robinson* v. *Taylor*, 2 Bro. C. C. 592. *Brydges* v. *Duchess of Chandos*, 2 Ves. jun. 417. *Williams* v. *Owens*, ib. 595. *Cave* v. *Holford*, 3 Ves. 650. *Lord Temple* v. *Duchess of Chandos*, ib. 685. *Harmood* v. *Oglander*, 6 Ves. 198, 8 Ves. 106. *Vawser* v. *Jeffery*, 16 Ves. 519, 2 Swan. 268. It was formerly holden that a mortgage *to the devisee* was a total revocation. *Harkness* v. *Bayley*, Pre. Cha. 514. *Coke* v. *Bullock*, Cro. Jac. 49. But contra, *Baxter* v. *Dyer*. 5 Ves. 661. *Peach* v. *Phillips*, 2 Dick. 538.

CASE 96. CHESTER *versus* PAINTER.

At the Council. UPON an appeal to the King in council from a decree in the Court of *Chancery* in the island of *Antigua:*

2 Eq. Ca. Ab. 313. pl. 21. 375. pl. 24. 560. pl. 6. One devises a third of all his estate whatsoever to his wife, and two thirds of all his real and personal estate to his son J. S. and his heirs; the wife has but an estate for life in the third part of the real estate, the word "estate" being intended to describe the "thing" only, and not the "interest" in the thing, and when the testator intends to pass a fee, he adds the word "heirs" to the word "estate."

The case was: One *John Painter* seised in fee of a real estate, and possessed of a personal estate in *June* 1711, made
[336] his will, and thereby gave and bequeathed one third part of *all his estate whatsoever* to his wife *Anne*, and devised to his son *John Painter* and to his heirs two thirds of all his real and personal estate, upon condition to pay his debts; and gave to *J. S.* the sum of ——— payable at twenty-one, and in the mean time he to have the yearly sum of ——— which did not amount to the interest of the legacy given to him. *J. S.* died under twenty-one, and his executors demanded the legacy presently.

In the privy council were present *inter al'* the Lord Chief Justice *Raymond*, Sir *Joseph Jekyll* Master of the Rolls, and the Lord Chief Justice *Eyre;* and the questions were,

1*st*, Whether the wife, to whom the third part of all the testator's estate whatsoever was devised, should have an estate in fee, or only an estate for life? (1)

2*dly*, Whether the wife should have a third part of the personal estate free from the debts, or only a third part of so much as should remain after payment of debts?

I devise 100*l.* to A. at his age of 21, A. dies before 21, his executors shall not have the legacy until such time, as A. should have come to 21, if he had lived.

3*dly*, Whether the executor of *J. S.* should be paid this legacy presently, or wait until such time as *J. S.* would, if he had lived, have attained his age of twenty-one.

As to the first, the *Chief Justices* and the *Master of the Rolls* without difficulty held, that by the devise of a third part of all the testator's estate whatsoever the land did pass, as well as the personal estate by virtue of the word [whatsoever]; but they conceived that the wife should have but an estate for life therein, the word [estate] being rather a description of the
[337] thing itself, than of the testator's interest in it; and by the next clause it appeared, that where the testator intended to

(1) On this head vide *Barry* v. *Edgworth*, post. 523.

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give a fee, there he took care to add the word [heirs] to the word [estate.] † (z)

But as to the other two points, the *Judges* and the *Master of the Rolls* took time to consider, and having met together, they all agreed, and *Raymond* C. J. delivered it as their unanimous opinion with regard to the second point, that the widow should have her thirds not liable to the debts, they being by the express words of the will fixed upon the other two thirds, by which the devise to the wife was rendered clear; and upon this point were cited *Dy.* 59, *b.* 164, *a. Goldsb.* 149.

As to the third point they likewise held unanimously, that the executors of the legatee should (*a*) wait for their legacy until such time as their testator should, in case he had lived, have attained twenty-one, it being unreasonable that the executors of *J. S.* standing in his place should be in a better case than *J. S.* himself would have been, had he been living; and it was to be presumed that the first testator had made a computation of his estate, and considered when the same would best bear and allow of the payment of this legacy; and there could be no reason given why an uncertain accident should accelerate the payment of this legacy before the time which was at first intended for that purpose. See in support of this resolution, 2 *Vern.* 94, 199, but 1 *Leo.* 277. *Lady Lodge*'s case, *contra.*

(*a*) Vide post. 478. Laundy v. Williams, and the distinction there taken between the executors or administrators of a legatee dying before the day of payment, and the devisee over.

The above case was reported to me by the Right Hon. Sir *Joseph Jekyll* Master of the Rolls.

† But see the case of *Ibbetson* v. *Beckwith*, where the devise was, of *all my estate* to *A.* for life, and to *T. D.* after her death, he taking the testator's name, and if he refused, to *M. B. and her heirs for ever.* The *Master of the Rolls* held *T. D.* took only an estate for life; but 11 *Dec.* 1735, Lord *Talbot* was of opinion *T. D.* had a fee, and varied the decree at the *Rolls.* Ca. temp. Tal. 157.

(*z*) But see *Frogmorton* v. *Holyday*, 1 Blac. Rep. 540. *Lord Cardigan* v. *Armitage*, 2 B. & C. 214.

1904. 1. Ch. 175.

ATTORNEY GENERAL *versus* HOOKER, and SOMNER *versus* HOOKER. [338]

CASE 97.

Lord Chancellor KING.

THIS suit (*inter al'*) was for a distribution of the surplus of a personal estate:

2 Eq. Ca. Ab. 441. pl. 45. In the case of a will, though an express legacy be given to the executors, yet if a legacy is also given to the next of kin, this is equally a bar to the next of kin, as to the executors; and therefore if the surplus be not disposed of by the will, the executors shall have it. Qu.

ATTORNEY GENERAL *v.* HOOKER.

The case was: One having a sister, who was next of kin, and having several sums of money in the *South-sea* and Bank, made his will, whereby he devised 100*l.* per annum to his sister for life, and the residue of his bank-stock to his executor, and devised ——— per annum out of his *South-sea* stock to ——— remainder of his said stocks to ——— he devised the furniture of his house to his executor and the heirs of his body, giving an express legacy or a sum of money to his sister, and making one who did not appear to be any relation to him executor; but there was no disposition of the surplus of his personal estate. On the death of the testator, the question was, how the residue of the personal estate should go?

Insisted by Mr. *Lutwyche* and Mr. *Talbot* on behalf of the sister the next of kin, that here being an express legacy to the executor, it necessarily implied that he was to have no more, *expressio unius est exclusio alterius*, the executor could not have *all and some;* and though the sister had an express legacy as well as the executor, yet this did not bar the next of kin from taking (under another will) by the statute of distribution; that in most of the cases which had been decreed where the executor had an express legacy, the next of kin had one too, which yet
[339] was no objection against letting such next of kin into a distribution; they admitted the case of *Ball* and *Smith* in Lord *Harcourt*'s time, where the testator marrying the widow and executrix of one *Atkins*, who as executrix was possessed of a considerable quantity of plate, and the testator *Smith* by his will gave to his said wife all the plate and goods which he had with her, and made her executrix, without disposing of the surplus; this being in the case of a wife, Lord *Harcourt* decreed the surplus to her; but they observed at the same time that the plate and goods were what she had already had as executrix of her former husband, and therefore the devise thereof to her was in strictness void; that according to Lord *Macclesfield*'s opinion every executor was but a trustee, and that if an executor dies intestate all the personal estate the property whereof is not altered, will go to the (*a*) administrator *de bonis non*, &c. and not to the next of kin to the executor.

(*a*) See the case of the Duke of Rutland versus Duchess of Rutland, ante 210. and Farrington versus Knightley, vol. 1. 553.

Solicitor General contra: It is a very strange construction that because the testator not knowing (perhaps) how far his personal estate will hold out, gives *in all events* an express legacy to his executor, therefore the latter shall not have the residue as executor: surely he shall; but in this case it is the stronger, since as to these stocks out of which particular

annuities are given to some persons for their lives, the remainder is devised to the executor, which shews that the remainder of the whole was intended to go to him; and it is like the case of the *Duchess of* (*b*) *Beaufort*, where the late Duke of *Beaufort* gave the use of his plate to his wife for life, and after her death gave the plate to his grandson (afterwards Duke of *Beaufort*) and made his wife executrix, without disposing of the surplus of his personal estate; whereupon though the court of chancery decreed the surplus to go to the next of kin, yet the House of Lords reversed that decree and gave it to the wife.

ATTORNEY GENERAL *v.* HOOKER.

(*b*) See Farrington versus Knightley, ubi supra.

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Lord Chancellor: I could wish an act of parliament was made to reduce this point to a certainty, for if it were once settled either way, it would be well enough; but in the present case, if the express legacy to the executor be allowed to exclude him from taking the surplus, by the same reason the express legacy to the next of kin will bar (1) her likewise; and then, here being exclusion against exclusion, the law must take place, and the executor have the surplus as executor.

As to what has been urged, that if an executor dies intestate, all the personal estate, the property whereof is not altered, shall go to the administrator *de bonis non, &c.* and not to the next of kin of the executor; this is true, because from the time the executor dies intestate, the first testator dies intestate also, and it was the executor's own fault that he did not, as he might, alter the property.

But the law says, and the general notion of mankind is, that the making a man executor, is giving him (*a*) all, which is the less to be wondered at, when it is considered that personal estates were not near so large formerly as they are at present.

(*a*) See the Office of Executors, chap. 1. pages 4th and 5th, express to this purpose.

Accordingly it was (2) decreed in the principal case, that the executor should take the surplus as executor; though Mr. *Lutwyche* said this would shake many precedents. (3)

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(1) *Harper* v. *Lee*, Mos. 3. sed contrà, *Wheeler* v. *Sheer*, Mos. 288. *Andrew* v. *Clark*, 2 Vez. 162.

(2) Reg. Lib. B. 1725. fol. 469. by the name of *Somner* v. *Hooker*.

(3) Vide *Farrington* v. *Knightley*, ante, 1 vol. 544.

THOMAS *versus* BENNET.

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CASE 98.

Lord Chancellor KING.

UPON a marriage settlement pin-money was reserved for the wife, (viz.) 50*l.* per annum for her apparel and private expenses,

An annual sum secured for the wife's pin-money for her apparel and expenses; if they cohabit together, and the husband maintain her, the arrears of pin-money are not recoverable.

THOMAS *v.* BENNET.

secured by a term for years; the husband died and soon after the widow died, upon which her executors demanded in equity 500*l.* for ten years' arrears of this pin-money; but it appearing that the husband maintained her, and on the other hand there being no proof that she had ever demanded the pin-money, this claim was disallowed. (1)

2*dly*, (*Inter al'*) the case was, that *Bennet* marrying *Mary* the niece of the testator *Thomas*, the latter by marriage articles agreed that he would at the time of his death leave or devise or otherwise convey, lands and tenements of the yearly value of 30*l.* to the heirs of the body of his niece *Mary Bennet* by her said husband and to *their heirs*, provided that if there should be more than one child of the marriage, then the testator *Thomas* should be at liberty to dispose of this 30*l.* per annum to such of the children of the niece as he should think fit; and in the beginning of the articles it was said to be for the better advancement of *Bennet* and his intended wife, and the issue of the marriage.

The testator *Thomas* died, *Bennet* and his wife were living and had seven children, and demanded for the children the 30*l.* per annum with the arrears thereof from the death of the testator *Thomas*.

[342] Objected, The 30*l.* per annum is to be left to the heirs of the body of the niece *Mary* by *Bennet*, & *nemo est hæres viventis*, so that this 30*l.* per annum is not to commence until after the death of the niece *Mary*, at which time all her children may be dead, consequently it is uncertain, whether the niece *Mary* will then have any heir of her body by *Bennet*, or who will be that heir.

Court of equity has a latitude in the construction of articles.

(*a*) Vide vol. 1. Bale v. Coleman, 145. Where the words [heirs of the bodies of the husband and wife and their heirs] shall be construed children.

Lord Chancellor: This is a case of articles, in the construction of which the Court has a much greater latitude than in the construction of limitations of estates: thus in the case of (*a*) marriage articles to settle lands on the husband and wife for their lives, remainder to the heirs male of their bodies, it shall be understood to have been intended the first and every other son; so here the words [heirs of the body of the niece by her husband] shall be construed (2) children, and the rather, because

(1) Vide *Powell* v. *Hankey*, ante 84. (2) Vide *Loveday* v. *Hopkins*, Amb. 273. (*z*)

(*z*) The courts have in many cases upon wills construed the words *heirs of the body* to mean *children*, where that construction appeared from the whole will to have been intended by the testator; *Doe* v. *Laming*, 2 Burr. 1100,

it is said just afterwards, and to *their* heirs, whereas if there be a son of the marriage, it must be *his* heirs alone that must take; and though in case there had been only daughters, the words [their heirs] had been proper, yet here are sons, and it cannot be intended that the provision was for daughters only, when not so expressed, and the proviso that reserves a power to the testator *Thomas* the uncle, if he thought fit, to give preference to any of the children before the rest, shews that all the children were to take, unless the testator *Thomas* the uncle should think proper to interpose, and make an appointment of the 30*l.* per annum to any one of the children; moreover the preamble of the articles was, that the issue should be advanced as well as the husband and wife, for which reason all the children of *Bennet* by his wife *Mary* that were born at the time of the testator's death, ought to take this 30*l.* per annum, and [343] are entitled to the arrears from the death of their uncle the testator *Thomas*.

Where there is a proviso in a will that in case what is left to one daughter shall exceed in value what is given to another, the former shall refund pro tanto; what is given to either of the daughters' children is to be looked upon as given to the daughter.

3*dly*, There being a clause in the testator *Thomas*'s will, that if the estate given by his will to his younger niece *Anne Lewellin*, should prove of greater value than what he had before given to his niece *Mary Bennet*, then so much should be taken from his niece *Anne Lewellin*, and be refunded to his eldest niece *Mary*, as would make them equal; it was thereupon objected, that what the children of *Mary* were entitled to by the said marriage articles could not be taken as given to *Mary*.

But *Lord Chancellor* interrupted the counsel in this, declaring it to be clearly his opinion, that what by the marriage articles was provided for the children of *Mary* by her friends, ought to be looked upon as part of the provision for *Mary*, and as done for her; since it was doing that for her children which otherwise she or her husband *Bennet* would have been obliged to do themselves.

A legacy given to J. S. shall not be taken to be a satisfaction of a subsequent debt.

4*thly*, Here being a legacy of 100*l.* given to the executor,

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1 Black. Rep. 265. *Doe* v. *Ironmonger*, 3 East. 533. *Doe* v. *Goff*, 11 East, 668. *Gretton* v. *Haward*, 6 Taunt. 94. *Doe* v. *Jesson*, 5 M. & S. 95. And such a construction has often been acknowledged to be the true one, where the courts have been unable to carry it into effect, on account of its incompatibility with some more general intention of the testator. *Doe* v. *Smith*, 7 T. R. 531. *Pierson* v. *Vickers*, 5 East, 548. *Doe* v. *Goldsmith*, 7 Taunt. 209. *Jesson* v. *Wright*, 2 Bligh, 1. over-ruling *Doe* v. *Goff*, and reversing *Doe* v. *Jesson*, sup. See also *Doe* v. *Harvey*, 4 B. & C. 610.

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and the testator having afterwards contracted a debt of 25*l.* with the executor (who was an attorney) for fees and business done, resolved without difficulty that this debt being contracted subsequent to the will, the legacy could be (1) no satisfaction for the same.

(1) So, *Cranmer*'s case, 1 Salk, 508. *Chauncey*'s case, ante, 1 vol. 409. *Fowler* v. *Fowler*, post. 3 vol. 355.

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Myl Hee. 672.

TERM. PASCHÆ, 1726.

CASE 99.

KEYLWAY *versus* KEYLWAY.

Lord Chancellor KING.

Gilb. Rep. 189, 190.
2 Stra. 710.
2 Eq. Ca. Ab. 441. pl. 47. 442. pl. 48.

ROBERT *Keylway* died intestate, leaving a wife and no child, and leaving a mother, three brothers, a sister, and two nieces, the children of a deceased brother, and possessed of a considerable personal estate, and the question being touching the distribution thereof:

By the statute of 1 Jac. 2. c. 17. if after the death of the father any of his children shall die intestate without wife or children, every brother and sister and their representatives shall have an equal share with the mother. The case was, after the death of the father the son died intestate leaving a wife, and without children, but leaving a mother, brothers and a sister, and two nieces the children of a deceased brother. Resolved that this was within the statute, and that the intestate's wife should have but one moiety; and as to the other moiety, that the intestate's brothers and sister, &c. should come in for an equal share thereof with the mother.

1*st*, It was admitted by all, that the intestate's wife was to have one moiety of his personal estate by the statute of distribution, 22 & 23 *Car.* 2. *cap.* 10, so that the only difficulty was, as to the remaining moiety, whether the intestate's mother as the next of kin should have it, or whether the intestate's brothers and sisters, &c. should come in for their shares thereof equally with the mother?

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Objected on behalf of the mother, that by the statute of distribution the mother as next of kin was entitled to this remaining moiety just as the father would have been, and that the brothers and sister, &c. could not be thought to be of equal degree of kindred to the intestate with the mother; *quod fuit concess' per cur'*.

Then it was insisted, that this case was not within the stat. of 1 *Jac.* 2. *c.* 17. *sect.* 7. the words of which are, "that if

" after the death of the father any of his children shall die in- " testate without wife or children in the life-time of the " mother, every brother and sister and the representatives of " them shall have an equal share with the mother;" for that in this case the intestate having a wife, it was not within this latter statute, which is to take place only in cases where the mother before the making thereof would have gone away with the whole personal estate; whereas here she would take but half.

It was admitted to be true, that the words of the statute are in the disjunctive, (viz.) if after the death of the father the child dies without wife *or* issue, that then every brother and sister, &c. should have their share equally with the mother; which word [or] might be thought to imply, that in *either* of these cases the brothers and sisters, &c. should be admitted to share with the mother.

But that was impossible; because if after the death of the father the child should die leaving no wife, but leaving *children*, it was impossible that the brothers and sisters or the mother should any of them have a share of the intestate's estate, which would all go to the intestate's own children; and therefore the word [or] should be taken for [and] as is (*a*) done in a great many cases; from whence it was concluded, that this case was not within the statute of *Jac.* 2. but rested upon that of distribution, *Car.* 2. by which the mother as next of kin took one moiety, and the wife would be entitled to the other. But

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(*a*) See the case of Richardson v. Spraag, vol. 1. 434.

Lord Chancellor decreed the contrary, holding the intention of the statute of *Jac.* 2. to be, that in every case where after the death of the father the child dies without issue, if there be no wife, the child's brothers and sisters shall come in equally with the mother as to the whole, and that where the mother before that statute came in for half, there the deceased child's brothers and sisters shall now come in for a share of that moiety; and that as the intention of the statute of *Jac.* 2. was in prejudice of the mother, so in the case which had now happened, the words were plainly against her, they being that " if after the death of the father any of the children shall die " without wife or children, then the brothers and sisters, &c. " shall have their share with the mother;" now here one of these contingencies has happened, and therefore the brothers and sister, &c. should come in with the mother.

He admitted, that if the intestate should have a child and no wife, and a brother and mother, in such case neither the brother nor mother would have any part, but the child should

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take all, because originally the lineal descendants the children, should be preferred before the lineal ascendants the father or mother; and the lineal ascendants, the father and mother, should be preferred to collateral descendants, the brother and sister. But this being altered by the latter statute, therefore it was now decreed that the mother of the intestate *Keylway* [347] should come in for no more than her share of the moiety of the personal estate with the intestate's brothers and sister, and the two nieces the representatives of the deceased brother. †

† This case was affirmed to be law by Lord Chancellor *Hardwicke*, in the case of *Stanley* versus *Stanley*, 15th of *May* 1739. 1 Atk. 457.

CASE 100.

WEBSTER *versus* WEBSTER.

At the Rolls.

ONE having by his will devised the residue of his personal estate to three persons, the question was, whether these were jointenants or tenants in common?

2 Eq. Ca. Ab. 572. pl. 1.

Devise of a residue of a personal estate to three is a joint devise, and shall survive.

It was urged that by the civil law such a devise of a *residuum* would plainly make a tenancy in common, and though by our law it would as plainly make a jointenancy, yet all matters legatory, and relating to personal estates, were to be construed according to the ecclesiastical laws; for the Spiritual Court had the proper jurisdiction of these matters, and it would be very inconvenient, if the legatees by suing here should have one judgment, and by applying to the Spiritual Court should have another.

On the other side it was urged, that in this case it appeared the executors had assented to the legacy, from which time, it having become a legal property, the same was determinable according to the rules of the common law. See *Jones* (*Tho.*) 130. *Bastard* versus *Stukeley*, 1 *Vern.* 482. *Lady Shore* versus *Billingsley*. That this was a case of very great and general concern, and that it had been constantly taken for granted since the above-mentioned authorities, that where there was [348] a joint devise of a *residuum*, the residuary legatees were jointenants, and supposing it to be otherwise, if one of the legatees should die in the life of the testator, his share would go according to the statute of distribution, as undisposed of.

To which it was replied, that though what had been said concerning the legacies becoming a legal property by the execu-

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tor's assent might be true in the case of specific legacies, of such and such particular chattels, yet when the devise was of the residue of the personal estate after debts and legacies and the charges of the executorship paid, (as it was in the present case) though the executor should assent to this bequest of the *residuum*, yet until it appeared that all the debts, legacies and charges of the executorship were paid, it would be impossible to know what the *residuum* was, and consequently no property could vest.

The *Master of the Rolls* said, this case was of great consequence, for which reason he would take time to consider of it; and afterwards gave judgment, that in this case the survivor should take the whole, and retain it in equity in the same manner as if it had been the case of a grant at law. (1)

The like decree was made by his Honour in the case of (a) *Cray* and *Willis*, 28 *June* 1729.

(a) 1 Eq. Ca. Abr. 243. which see also post 529. within the reasons upon which that resolution was grounded.

(1) As to this case vide *Jolliffe* v. *East*, 3 Bro. C. C. 25.

TERM. S. TRINITATIS, 1726.

WEST *versus* ERRISSEY. In Scac'.

CASE 101.

THE bill was to have the benefit of marriage articles dated 23 *December* 1685, and made on the marriage of *Richard Errissey* with *Frances* the daughter of Sir *Peter Killigrew*, and that the settlement which (either through mistake or fraud) was made in a different manner from what was contained in the articles, might be set right.

Com. Rep. 412. 2 Eq. Ca. Abr. 39. pl. 2. See post 535. Powel versus Price. Articles on marriage to settle lands on husband and wife for their lives, remainder to the heirs male of the body of the husband by the wife, remainder to the heirs male of the body of the husband by any other wife, remainder to the heirs "female" of the body of the husband by this wife. A settlement is made before the marriage, and said to be pursuant to the articles, whereby the lands are limited to the husband for life sans waste, and with power to make leases, remainder to the first, &c. son of the marriage in tail male, remainder to the first, &c. son of any other marriage in tail male, remainder to the "heirs of the body" of the husband. There are issue two daughters, and the husband suffers a recovery, and devises the premises to his sister; the daughters may in equity compel the devisee to convey the premises to them.

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The two plaintiffs *Mary* and *Frances West* were the granddaughters and coheirs of this *Richard Errissey* and *Frances* his wife, and by the said marriage articles *James Errissey* the plaintiff's grandfather's uncle being seised in fee of divers manors and lands in *Cornwall* and *Devonshire*, did, in consideration of the marriage and marriage portion, covenant to
[350] settle great part of the premises (mentioning the parcels) to the use of *Richard Errissey* the plaintiff's grandfather (the then intended husband of *Frances*) for life without waste, remainder as to part to the use of *Frances* the intended wife for life, remainder of the whole to the heirs male of the body of the said *Richard Errissey* by *Frances*, remainder to the heirs male of the body of the said *Richard Errissey* by any other wife, remainder to the *heirs female* of the body of the said *Richard Errissey* by *Frances*, remainder over; with power for the said *Richard Errissey* to make leases for three lives, and to make a jointure.

Afterwards, and before the marriage, by indenture dated the 24th of *March* in the same year 1685, a settlement was made of the premises, and mentioned to be in *pursuance and performance of the articles*, by which *James Errissey* the uncle conveyed the premises to the use of *Richard Errissey* the husband for life *sans* waste, remainder to *Frances* his wife for her life for her jointure, remainder to the first, &c. son of the marriage in tail male successively, remainder to the first and every other son of the said *Richard Errissey* by any other wife in tail male successively, remainder to the *heirs of the body* of the said *Richard Errissey* by the said *Frances*, remainder over.

By which settlement there was an omission of trustees for supporting contingent remainders, and instead of limiting a remainder to the *daughters* of the marriage the limitation was to the heirs of the body of *Richard Errissey* by the said *Frances*, which plainly gave an estate-tail to *Richard Errissey*, and consequently a power to bar the daughters of that marriage, and also the remainders over by a recovery.

[351] *Richard Errissey* had issue by the said marriage one only daughter *Mary*; and

In *Trinity Term* 1698, taking advantage of this mistake, sold part of the premises to the amount of 6000*l.* and upwards, and having suffered a common recovery of such part of the premises as remained unsold, by indenture of the 16th of *February* 1709, conveyed the premises unsold to trustees (*Worth* and *Herle*)

and their heirs, in trust to himself for life, remainder to such trusts as he should declare by will.

Afterwards the said *Richard Errissey* by will dated the 27th of *December* 1722, devised the premises to his sister the defendant *Mary Errissey* and her heirs, except a small tenement which he devised to one *Barrable* and his heirs, and having made the defendant *Mary Errissey* executrix, died in *January* following.

Mary the daughter of *Richard Errissey* by *Frances* married Colonel *West*, and they had issue the now plaintiffs *Mary* and *Frances West* both infants; *Mary West* the mother died, and

The two plaintiffs *Mary* and *Frances West* brought their bill against *Mary Errissey*, in order to rectify the mistake in the settlement, whereby the premises, instead of being limited in strict settlement as they ought to have been in compliance with the articles and the intent thereof, were settled in tail upon the said *Richard Errissey;* but as to the premises sold, the bill did not seek to disturb the purchase, only to recover the purchase-money out of the assets of *Richard Errissey*.

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The defendant *Mary Errissey* pleaded the settlement of 1685, the common recovery, the will of *Richard Errissey*, and the long enjoyment of the premises; and the plea being argued before the Lord Chief Baron *Gilbert* and the other Barons, the same was over-ruled unanimously.

Afterwards the cause coming on to be heard before Lord Chief Baron *Pengelly* (who had succeeded to that place on the death of Lord Chief Baron *Gilbert*) and the Barons *Hale*, *Carter* and *Comyns*, the bill was dismissed (*a*) without costs; it being dangerous (as it was said) to set aside a settlement which seemed to have been deliberately and solemnly made.

(*a*) Dec. 1726.

That it appeared the daughters of this marriage were postponed to the sons of a subsequent marriage, and so their advancement by this reversion was not so much regarded; that though the case of *Trevor* and *Trevor* (*b*) was an instance in point, where marriage articles for settling lands on the husband for life, remainder to the heirs male of his body by his then intended wife, had been construed to mean his first and every other son in tail male, yet where there had been another remainder, whereby the premises were agreed to be limited to the heirs female of the body of the husband by the wife, this had never been construed to mean daughters, the sons being more to be regarded than daughters, as they pre-

(*b*) Vide vol. 1. 622.

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serve the name of the family; besides, that the settlement of 1685 had been attested by Sir *Peter Killigrew* father of the said *Frances*.

From this decree an appeal (1) was brought in the *House of Lords*, where it was insisted, 1*st*, that by the marriage-articles
[353] it was agreed that the estate should be limited to *Richard Errissey* for his life *sans waste*, and that he should have power to make leases, which was a plain evidence that the estate was intended to be limited in strict settlement, and that *Richard Errissey* should be but tenant for life, and have no power to *bar* either his sons or daughters by fine or recovery.

2*dly*, That the settlement took notice of the articles, and was expressly mentioned to be made *in pursuance and performance thereof*, which words were a demonstration that the parties did not design to depart from, or vary the terms of the articles, nor had come to any new agreement for that purpose, and that it was apprehended the limitations in the settlement under which *Richard Errissey* by construction of law became tenant in tail, had proceeded from the mistake or negligence of the counsel who drew the same, and not from any agreement or design of the parties to vary the terms of the articles; of which mistake or neglect, the omission of the common limitation to trustees to preserve contingent remainders was a plain proof.

3*dly*, That the respondent was a volunteer under the will of *Richard Errissey*, who took advantage of the mistakes in the settlement, and suffered a common recovery to bar his issue, although *Mary* his daughter was then living, which was apprehended to have been a manifest breach of trust in him.

Indeed it had been objected, that although courts of equity had in like cases decreed an execution of marriage articles in strict settlement, in favour of sons, yet had they not extended it in favour of daughters, who were most commonly provided for by a term for years, to raise portions for them in case of issue male.

[354] But surely the reason seemed to be as strong, that the expression of heirs female of the body contra-distinguished from sons, should in marriage articles have the same construction in favour of daughters, as the expression of heirs male in favour of sons, since both were equally under the contemplation of the parties, and especially since in the present case there was no

(1) 3 Bro. P. C. 327.

other provision for daughters besides the limitation intended them by the marriage-articles. (1) And according to the common course where a provision is made for daughters by a term for years, it is always so limited, as to be out of the power of the father to bar it.

It had been objected, 2*dly*, that the settlement being made before the marriage, it was to be presumed that the parties came to some new agreement to vary the terms of the articles, and that the settlement was made to the satisfaction of Sir *Peter Killigrew*, who was a witness to the settlement, as he had been a party to the articles.

Resp. But (it seems) the settlement was not only expressed to be in pursuance and performance of the articles, but the appellants by their bill charging that the parties came to no new agreement after the date of the articles to vary the terms thereof, the respondent *Errissey* by her answer had admitted she never pretended that the parties after the articles came to any new agreement to vary them. And as to Sir *Peter Killigrew*'s being a witness to the said settlement, he (as most gentlemen in like cases) relied upon his counsel's framing the settlement so as to answer the intent of the articles, being himself a stranger to the forms and method thereof.

Object. 3*dly*, But after such a length of time and an acquiescence under the settlement, the appellants ought not at this time of day to have resort to the articles of marriage. [355]

Resp. The appellants were infants, whose title did not accrue till after the death of *Richard Errissey* the grandfather in *January* 1722, and they filed their bill for relief within a short time after.

4*thly*, It had been objected, if the articles of marriage should be allowed to control and vary the settlement, the purchasers under *Richard Errissey* would in consequence be affected (2).

To which it was answered, that the appellant's bill was not brought against any purchaser; since as to those parts of the estate which were sold by *Richard Errissey*, the appellants only prayed that they might have satisfaction for the same out of the

(1) Sed vide *Powell* v. *Price*, post 535.

(2) Vide *Warrick* v. *Warrick*, 3 Atk. 293. (*z*)

(*z*) *Senhouse* v. *Earle*, Amb. 287. *Hardy* v. *Reeves*, 4 Ves. 466, 5 Ves. 426. *Parker* v. *Brooke*, 9 Ves. 587.

WEST *v.* ERRISSEY.

personal estate of the said *Richard Errissey*, which had been principally acquired by those sales in breach and violation of the trusts; and that by the conditions in his will annexed to the trifling and fruitless bequests to the appellants his granddaughters and heirs at law, he seemed to be aware of the injury he had done them, and that his personal assets would be liable to their demands in respect thereof.

(*a*) February 1727.

Whereupon the House of Lords reversed (*a*) this decree of dismission, and decreed that the trustees *Worth* and *Herle* and the respondent *Mary Errissey* should convey such of the premises as were comprised in the articles to trustees, to the use of the appellants *Mary* and *Frances West*, and to the heirs

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female of their bodies as tenants in common, with cross remainders to them in tail female; and the respondents *Mary Errissey* and *Barrable* to account for the profits and to pay the same to the appellants the infants; also *Mary Errissey* the executrix to account for the purchase-money that had been received by the said *Richard Errissey* for such part of the premises as he had sold, and pay the interest thereof to the appellants *Mary* and *Frances West;* and the respondents to bring their writings into the Court of Exchequer, and deliver up the possession to the appellants the infants; but as to the principal monies arising by the said sales, these were to be laid out in the purchase of lands in fee, to be settled to the same uses as the lands unsold were decreed to be conveyed (1). (*z*)

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(1) The rule of executing marriage-articles by limitations in strict settlement (although the articles by *legal* construction give an estate of inheritance to the husband or wife) is established in favour of issue *male* by many cases; first, where there are articles *only*, as in *Jones* v. *Laughton*, 1 Eq. Ca. Ab. 392. pl. 2. *Nandick* v. *Wilkes*, 1 Eq. Ca. Ab. 393. pl. 5. *Cusack* v. *Cusack*, 1 Bro. P. C. 470. *Trevor* v. *Trevor*, ante, 1 vol. 622. *Robinson* v. *Hardcastle*, 2 T. R. 252. So where there are articles before marriage, and a settlement is made after marriage in the words of the articles, as in *Streatfield* v. *Streatfield*, Ca. temp. Talb. 176. Or, where there are both articles and settlement before marriage, and the settlement is made *in pursuance* of the articles, as in *Honor* v. *Honor*, ante, 1 vol. 123. *Roberts* v. *Kingsley*, 1 Vez. 238. But otherwise, where the settlement made *before* marriage is *not* in pursuance of the articles, for then the parties will be presumed to have come to a new agreement, *Legg* v. *Goldwire*, Ca. temp. Talb. 20. *Partyn* v. *Roberts*, Amb. 315. According to the cases of *Burton* v. *Hastings*, Gilb. Eq. Rep. 113. *West* v. *Errissey*, supra, *Hart* v. *Middlehurst*, 3 Atk. 371. the same equity arises to the issue *female;* sed contra *Powell* v. *Price*, post. 535. (*y*)

The cases above-mentioned were decided on this principle, viz. that it was

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(*z*) See *Randall* v. *Willis*, 5 Ves. 262. *Taggart* v. *Taggart*, 1 Sch. & L. 87. and the cases collected in note to *Uvedale* v. *Halfpenny*, ante, 152.

(*y*) But in *Powell* v. *Price*, the arti-

HOLT *versus* FREDERICK.

CASE 102.

Lord Chancellor KING.

2 Eq. Ca. Ab. 446. pl. 2.

If the mother being a widow advances a child and dies intestate leaving many children, the child advanced shall not bring what he received from his mother into hotchpot.

IN this case (*inter al'*) the following point arose: *Martha Frederick* who married one *Holt* and survived him, had three children, two sons and a daughter, and having out of her own estate given 1000*l.* to her daughter in marriage, died intestate, leaving those three children; and the question was, whether the daughter who had received this 1000*l.* from her mother, ought to bring it into hotchpot, before she should receive any further share of her mother's personal estate?

On behalf of the daughter it was urged by Dr. *Sayer* and others, that the mother was not within the clause relating to hotchpot; that the statute of distribution was grounded upon the custom of *London*, which did not extend to women, though free of the city, but only to men; that the statute accordingly says, "if a *man* dies intestate leaving a wife and children, the [357] "wife shall have a third, and the children the two other thirds;" which shews, that none are within the act, but those who are capable of having a wife; and further, that the words of the statute, "the children of the intestate not being heirs at law, "other than such children as shall have been advanced by the "intestate in *his* life-time," &c. are an argument that this clause relates only to the father, and that it is he, and not the mother, who is to be presumed capable by his acquisitions of advancing a child. And lastly, there could not be produced a single instance, since the making of the statute of distribution,

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inconsistent with the idea of a settlement to give such an estate to a parent, as to enable him to defeat immediately all the limitations in favour of the other branches of the family. But where that mischief does not occur, or where the intention of the parties to create an estate of inheritance is sufficiently explicit, it seems the rule is not applicable. *Chambers* v. *Chambers*, Mos. 333. *Green* v. *Eakins*, 2 Atk. 476. *Partyn* v. *Roberts*, Amb. 315. *Cordwell* v. *Mackrill*, Amb. 515. (*x*) *Highway* v. *Banner*, 1 Bro. C. C. 584.

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cles provided for the issue female by a portion, the want of which provision was one of the reasons for the Lords' judgment in *West* v. *Errissey*; (Com. Rep. 417.) and in *Powell* v. *Price*, the articles expressly limited the estate to the first, &c. son, whereas the limitation under which the daughter claimed was merely a remainder to the heirs of the settlor's body, not saying heirs *female*, so that it might well be supposed that the parties to the articles intended a remainder in strict settlement to the sons *only*. See *Howel* v. *Howel*, 2 Vez. 358. and the remarks on *West* v. *Errissey* and *Powell* v. *Price* in Fearne, C. R. 103. (6th Edit.)

(*x*) S. C. 2 Eden, 344.

HOLT *v.* FREDERICK.

of a child's bringing into hotchpot any advancement that was given him by the mother.

On the other side it was replied, that a mother surviving the father and dying intestate, was within the statute as well as the father; and if within one part of the act, why not within every part? that a woman was also within the act where there was no child; that the word *his* took in both sexes, as *mankind* comprehended both, and *homo* was *hic vel hæc homo;* that the act of parliament intended an equality among children, and this favourite doctrine in equity ought to be extended as well in case of a mother as a father. A mother was as much a parent as a father, and as much bound by the law of nature to provide for her children; and that the reason why the custom of *London* did not extend to women was, for that the custom was originally provided for those, who were concerned in trade, and (generally speaking) were men not women, and all citizens are presumed to be traders.

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Lord Chancellor: It weighs with me, that this act of distribution was grounded on the custom of (*a*) *London*, which never affected a widow's personal estate; and the act seems to include those within the clause of hotchpot, who are capable of having a wife as well as children, which must be husbands only; and so in this case, (though without much debate) his Lordship ruled that the daughter should not bring the 1000*l.* which she had received in her mother's life-time, into hotchpot. (1)

(*a*) Post. Edwards and Freeman, 435.

1. Tu. Ab. 623.
1. Hare. 611.

(1) Reg. Lib. A. 1725, fol. 425.

CASE 103.

COTTON *versus* KING.

Lord Chancellor KING. Mos. 259. 2 Eq. Ca. Ab. 53. pl. 10. If a parent make a voluntary conveyance in trust for his children, and keep it in his own power, or in the hands of his agent, and this is got from him, it ought not to bind him; but where a feme having issue by her first husband makes a suitable provision for them before her treaty for a second marriage, this is good, and not liable to be avoided by a second husband.

THE Lady *Cotton*, widow of Sir *Thomas Cotton*, had ten children by her first husband Sir *Thomas*, and about a year after his death married the defendant Captain *King* her second husband, but before the treaty for her second marriage, she being seised in fee of an house in *Cheshire* which she herself had purchased, settled this house to the use of herself during her widowhood, remainder to her second son *Stephen* by her first husband Sir *Thomas Cotton* in tail, the remainder over; and

being seised of an estate for life of about 1000*l.* per annum in other lands, she demised them to trustees for ninety-nine years, if she should so long live, in trust for herself during her widowhood, and afterwards in trust for her said second son *Stephen Cotton* by her husband Sir *Thomas;* and likewise by an indenture of the same date covenanted to transfer 1000*l.* *South-sea* stock (of which she was then possessed) to trustees in trust for herself for her life, if she should so long continue a widow, and afterwards in trust for her said second son, but the stock was never transferred; and all these three deeds were drawn by one *Brereton* an attorney employed by her for that purpose, and [359] were by her delivered into the said *Brereton*'s hands, with a strict charge, that he should not part with them, and she herself had oftentimes declared, that she had done this for the sake of her children; but Lady *Cotton* swore, that she never gave notice of any of these writings to the defendant Captain *King* her second husband, who also swore that he had no notice of any of these deeds before his said marriage with Lady *Cotton*, but on the contrary that Lady *Cotton* before her marriage delivered to him a particular of her estate, wherein were comprised these several houses and lands, and this 1000*l.* *South-sea* stock, all written with her own hand, and this particular was produced and proved to be her hand, but not proved to have been delivered by Lady *Cotton* to Captain *King* before the said marriage; it moreover appeared, that the Lady *Cotton*'s jointure was worth 1000*l.* per annum.

The bill was brought to have these lands and stock and the mesne profits since the marriage, and the deeds delivered to the plaintiff the second son.

It appeared in the cause that the deeds, of which there were duplicates, continued in *Brereton*'s hands until after the second marriage, and that afterwards Lady *Cotton* sent for them, and that she received them and placed them in another hand, (one *Grey*'s) where they were left, and came to the executors of the said *Grey*, who were made defendants in this cause.

Lord Chancellor: As to the Lady *Cotton*, if she had executed these deeds, and kept them in her own hands or custody, and they had been got from hence, I do not think she should have been bound by them; so if they had been placed in the hands of her agent, for her agent's hands are her hands, and *Brereton* seems to have been her agent, he having been employed by her to draw these deeds, and no other person privy [360] thereto.

See the case of Naldred versus Gilham, vol. 1. 577.

COTTON v. KING.

But then it is of weight against Lady *Cotton*, that there were duplicates of these deeds, and that there is evidence, that she had declared it to be her intention and desire to put this out of her power, so that I should make no difficulty, if the lady were the survivor and the only defendant in the cause, to decree against her.

But as to the husband, who had no notice of any of these deeds, and as to whom the Lady *Cotton* appeared the visible owner and in possession, it is hard to decree against him, or do any thing whereby to expose him to be hurt by these deeds; such a settlement made by a woman before marriage, without the privity of the husband, seems to be fraudulent. (1)

As to the deed of covenant to transfer the 1000*l.* stock, I would put this case; suppose a woman privately before marriage gives a bond without any consideration to a third person for 1000*l.* and marries one who knows nothing of this bond, surely equity would relieve against such bond; and though in case of a provision for younger children, there is the consideration of blood and natural affection, yet all these deeds, as against a purchaser, would be fraudulent and void. I incline to give no relief in this case.

But then it was said that the plaintiff desired no decree against Captain *King* and his wife Lady *Cotton*, only as to the defendants who had the deeds in their custody, and were willing to deliver them up being indemnified, and had really no right to them, it was hoped these deeds should be delivered up,
[361] for that they belong to the plaintiff *Stephen Cotton*, for whose benefit they were made.

Lord Chancellor: This deserves to be considered, wherefore I will give my judgment therein to-morrow.

Accordingly the next day his Lordship decreed the defendants the executors of *Grey* to deliver up the deeds to the plaintiff, and that the plaintiff might sue in the name of the trustees, without prejudice to any relief that the defendant *King* might have on his bill, and the bill to be dismissed as to the defendant *King* and his wife without costs. (2) *Vide King* versus *Cotton*, post, 674.

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(1) Vide *Hunt* v. *Mathews*, 1 Vern. 408. *Howard* v. *Hooker*, 2 Cha. Rep. 81. *Poulson* v. *Wellington*, post, 533. *Thomas* v. *Williams*, Mos. 177. *Countess of Strathmore* v. *Bowes*, 2 Bro. C. C. 345. (*z*)

(2) Reg. Lib. A. 1725, fol. 466.

(*z*) S. C. 1 Ves. jun. 22. 2 Cox, 28. *Ball* v. *Montgomery*, 2 Ves. jun. 194.

11. Sim. 271. 1921. 1. Ch. 491.
2. Mc. & Keen. 776.

1917. 1. Ch. 366.

CARRICK *versus* ERRINGTON.

CASE 104.

1920. 2. Ch. 495.

Lord Chancellor KING.

9 Mod. 33. Mos. 9. 2 Eq. Ca. Ab. 623. pl. 13. 624. pl. 20, &c.

The statute of the 11 & 12 W. 3. cap. 4. which disables a papist from purchasing land, disables him from taking by purchase, and consequently from taking by devise.

EDWARD *Errington* seised in fee of lands in *Northumberland*, by lease and release in 1714, settled the same to the use of himself for life, remainder to his first, &c. son in tail male successively, remainder to *Thomas Errington* a papist for life, remainder to trustees and their heirs during the life of *Thomas Errington* the papist to preserve contingent remainders, remainder to his first, &c. son in tail male successively, remainder to *William Errington* a protestant for life, remainder to trustees and their heirs during the life of *William Errington* to preserve, &c. remainder to his first, &c. son in tail male successively, remainder to his own right heirs.

Edward Errington died without issue, leaving sisters who were his heirs at law and protestants, and one of the questions was, what should become of this estate, and who should take the profits thereof during the life of *Thomas Errington* the papist, whether the heir at law of *Edward* the grantor, or the remainder-man?

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And first it was ruled by *Lord Chancellor*, and given up by the counsel on all sides, that since the great case of *Roper* (1) and *Radcliffe*, which was resolved in the *House of Lords*, the latter clause of the statute of 11 & 12 *W.* 3. *cap.* 4. for preventing the growth of popery, and which disables a papist from taking any land, or trust or interest in or out of land, by purchase, must not only be understood to prevent a papist from buying lands, but also to disable him from taking any lands by purchase, and therefore in the aforesaid case, where the devise was of lands to be sold for the payment of debts, and the surplus to the papist, forasmuch as the papist would be entitled to the surplus of the estate, paying the debts, this was construed a void devise, as to the papist.

Devise to A. a protestant for life, remainder to B. a papist for life, remainder to C. a protestant; A. dies, B. being a papist is disabled to take, and C. shall take presently, in the same manner as if the remainder had been to a monk.

2*dly*, That if the case were no more than that lands were limited by lease and release to the use of *A.* a protestant for life, remainder to *B.* a papist for life, remainder to *C.* a protestant, and *A.* dies, in such case the remainder to *B.* the papist being void, the next remainder to *C.* shall take effect presently, in the same manner as if a remainder were limited

(1) 9 Mod. 167. 181. 10 Mod. 230. and 1 Bro. P. C. 450.

CARRICK v. ERRINGTON.

to a monk for life, or to one who refuses to take: or if such remainder-man were dead, and there had never been such limitation. (1)

Devise of lands to A. for life, remainder to B. a papist for life, remainder to trustees for the life of B. in trust to let B. take the profits and to preserve the contingent remainders.

In the next place the Court declared, that the said statute extending to trusts as well as legal estates, * the remainder limited to trustees to preserve contingent remainders, as to such part and so much as was declared to be in trust to let *Thomas Errington* the papist take the rents and profits during his life, was a void trust; but that the trust to preserve contingent remainders to the first, &c. son of *Thomas Errington* the papist was good.

The trust to let B. the papist take the profits is void; but the trust to preserve the contingent remainders good. And in this case the grantor and his heirs being protestants shall have the profits during the life of B. the papist, and after B.'s death then they shall go to B.'s son, being a protestant.

[*363] 3*dly*, In the principal case it was held, that in regard if the estate should go to the subsequent remainder-man *William Errington* the protestant, it could not afterwards go back to any sons of *Thomas Errington* the papist who might be protestants; and this being an hardship and wrong to a third person, therefore the rents and profits of this estate, during the life of *Thomas Errington* the papist, ought to go back to the sisters and heirs at law of *Edward Errington* the grantor, and that these sisters and heirs at law of *Edward Errington* being protestants, should have the rents of the premises from the death of *Edward Errington* the grantor.

Notwithstanding it was strongly objected, that the conveyance being by way of lease and release, the whole estate passed out of the grantor, and could not return to him again, but must go to the next in remainder capable of taking; and further, that since this was a trust in the trustees during the life of *Thomas Errington* the papist, and a trust was a creature of equity, the Court, which had the power and direction thereof, ought to let *William Errington* the next remainder-man into the possession of the premises, and that in case *Thomas Errington* the papist should leave protestant sons, then the Court would order the trust for the benefit of such son, and secure the profits to him.

[364] But *Lord Chancellor* said, this would be making use of an extraordinary power of directing and displacing estates, which he would not take upon himself to do; and that the intent and meaning of the statute was in a more plain and easy manner complied with, by construing the estates and trusts to be void,

(1) Vide *Thornby* v. *Fleetwood*, 1 Stra. 318.

as to the papist only, but not to let the next protestant remainder-man into possession before his time, so as to prejudice or endanger a third person, the son or sons of *Thomas Errington* the papist, &c. wherefore let the heir at law of the grantor take the estate for so long a time only, as the same is undisposed of by the grantor (1). (*z*)

4thly, It was held, that as to the former clause of this statute, which disables papists from taking by descent, unless they conform within six months after eighteen, if they (the papists) were above six months after eighteen before the making the statute, so as it was impossible to comply with the statute, then such persons are not within the clause, nor shall suffer by it. (2)

If a papist was above the age of eighteen and six months when this statute of Will. 3. was made against papists, he is out of the former clause of the statute.

This decree was afterwards affirmed (3) on an appeal in the House of Lords.

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(1) *Hopkins* v. *Hopkins*, Ca. temp. Tal. 44. and another branch of the same case, 1 Atk. 597.

(2) Vide *Hill* v. *Filkin*, ante, p. 6.

(3) 3 Bro. P. C. 412.

(*z*) So *Tregonwell* v. *Sydenham*, 3 Dow, 194. See also *Jackson* v. *Hurlock*, Amb. 487, 2 Eden. 263. *Gravenor* v. *Hallum*, Amb. 643. *Gibbs* v. *Rumsey*, 2 V. & B. 294. *Jones* v. *Mitchell*, 1 S. & S. 290.

WATTS *versus* THOMAS.

CASE 105.

At the Rolls.

THE husband purchased a term for years to himself and his wife, and the survivor, and the executors * administrators and assigns of such survivor for the residue of the term.

Husband after marriage purchases a term to himself and wife, and the survivor and the executors, administrators and assigns of such survivor; husband assigns the term in mortgage, proviso to be void on payment of the money by him or wife, or the executors of him or wife. Proviso that the husband, his executors or administrators shall till default of payment quietly enjoy. Husband, seven years after, contracts debts and dies. Decreed that this settlement of the term being after marriage, in the power of the husband, and the equity of redemption being reserved to him as well as to his wife, and being also in the case of creditors, was assets to pay debts.

This purchase was made after the marriage, and the husband being a tradesman and having occasion for money, mortgaged the term without the wife's joining (as he might do) and the proviso for redemption was, that if the husband and wife, or either of them, or their or either of their executors or administrators should pay or cause to be paid the mortgage-money and interest at the day, then the mortgage should be void.

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WATTS v. THOMAS.

And the last proviso was, that until default of payment the husband, his executors and administrators, should quietly enjoy.

The husband seven years after contracted debts, and died, leaving his wife executrix, the mortgage-money unpaid.

The question was, whether the equity of redemption of this term was assets for the payment of the husband's debts, or should go to the wife as survivor?

By *Talbot* Solicitor General, the proviso is, that upon payment, whether it be by the husband or the wife, or the executors of the husband or of the wife, yet still the mortgage shall in any of these cases be void; and if void, then all things must be in their former state, and consequently the wife must have it as survivor; *secus* if the proviso had been that upon payment, the mortgagee should re-assign to the husband, his executors or administrators, for this indeed had been a total alienation; but in the present case it was but a conditional alienation, and so void upon payment of the money.

[366] *Master of the Rolls:* The settlement of this term upon the wife being after marriage, is a voluntary conveyance, and being only a term for years, it was always in the power of the husband to forfeit or alien, and the mortgage is an alienation; for though if the mortgage-money were paid before the day, the mortgage would have been void, and consequently all things would have been *in statu quo*, yet the mortgage being forfeited, the equity of redemption (always in the husband's power) is now become a creature of equity, and it being in the case of creditors, and the redemption given as well to the executors of the husband, as to the executors of the wife, and the last proviso being that the husband, his executors, &c. may enjoy till default of payment,

Decree the equity of redemption of this term to be assets. (*z*)

(*z*) Sed qu: For, first, it is now settled that a voluntary conveyance by a person not indebted at the time is not within the stat. 13 Eliz. c. 5, and is good against subsequent *creditors; Lord Townshend* v. *Windham*, 2 Vez. 11. *Stephens* v. *Olive*, 2 Bro. C. C. 90. *Lush* v. *Wilkinson*, 5 Ves. 384. *Kidney* v. *Coussmaker*, 12 Ves. 136. *Holloway* v. *Millard*, 1 Madd. 414. *Battersbee* v. *Farrington*, 1 Swan. 113. Secondly, The wife's contingent interest in the term by survivorship was not in the husband's power to alien; Co. Litt. 46 b. 351 a. Butler's note; and see post, 608, note (*z*); unless the settlement could be treated as void as against subsequent *purchasers* by the stat. 27 Eliz. c. 4. But, if the case is rightly stated, the estate was not the husband's own before the settlement, but was originally purchased by him to himself and his wife and the survivor; and if so, the settlement was good

HEATH *versus* HEATH.

Case 106.

At the Rolls.
2 Eq. Ca. Ab. 375. pl. 26.
One seised in fee of a real estate, and possessed of a personal estate by will directs that his legacies be paid out of his real estate, and devises his personal estate to his children; his children shall have his personal estate free from the legacies, but charged with the debts, and the real estate only shall be charged with the legacies.

One seised in fee of lands, and possessed of a personal estate, having children and owing money gives legacies by his will, and directs that *they shall be paid out of his real estate*, and gives his personal estate to his children.

Master of the Rolls: If the legacies had been only *charged* upon the real estate, yet the personal estate should have been first applied to pay them, and so should it have been against a residuary legatee; but in this case *the real estate being the fund appointed, and the whole personal estate* (1) *given away by the will*, therefore the legacies must be paid out of the real estate only; but the debts shall still be paid out of the personal estate, the will not ordering the debts to be paid out of the real. (2)

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(1) On this head vide *Haslewood* v. *Pope*, post. 3 vol. 324.

(2) *Thomas* v. *Britnell*, 2 Vez. 313.

against subsequent purchasers, and even the mortgage could not have been supported if it had been disputed. *Back* v. *Andrew*, 2 Vern. 120. *Lady Gorge's Case*, Cro. Car. 550. And see Sugden, Vendors, ch. 15. sect. 2. (p. 541, 2, ed. 1818). But, thirdly, supposing that the alienation by the husband was valid, still, if such alienation did not extend to the whole interest, the wife claiming under the settlement, and not the subsequent creditors, was entitled to the undisposed interest. Now here was no alienation of the whole interest, for a mortgage is only an alienation *pro tanto*, *Rider* v. *Wager*, ante, 334, and does not, except for the purposes of the mortgage, alter the title to the estate in equity, even where a wife joins her husband in mortgaging her estate, and the equity of redemption is reserved to the husband. *Ruscombe* v. *Hare*, 6 Dow, 1. And see *Clinton* v. *Hooper*, 3 Bro. C. C. 201, 1 Ves. jun. 173. *Innes* v. *Jackson*, 16 Ves. 356, 1 Bligh, 104. *E. of Kinnoul* v. *Money*, 3 Swan. 202. n. *Pitt* v. *Pitt*, 1 Turner, 180. It seems therefore, that the wife in the principal case was entitled to redeem.

(94). P. 277.

CASE 107.

WATKINSON *versus* BERNADISTON.

At the Rolls. 2 Eq. Ca. Ab. 512. pl. 1. On a ship's being repaired in the river Thames, and fitted out there with new rigging and apparel, the ship itself is not liable, but the owners. Secus if repaired or fitted out at sea, where the master alone may hypothecate.

IN this case it was decreed (1) by the *Master of the Rolls*, and seemed to be admitted by the counsel on both sides, that if a ship be in the river *Thames*, and money be laid out there, either in the repairing, fitting out, new rigging, or apparel of the ship, this is no charge upon the ship, but the person

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(1) The ship in question having been sold and the money brought into Court, and a reference having been made to the Master to inquire and state the nature and extent of the demands of the several parties on this money, and how far they affected the said ship, the Master (after stating the claim of the mortgagee *Bernadiston*) reported "that the "plaintiff was the master or commander "of the ship, and that there was due "to him on the 9th of *March* 1715, "from the defendant *Paine*, the owner "of the ship, for his the said plaintiff's "and his sailors' wages, and for monies "disbursed by the plaintiff, on account "of the said ship, in *Carolina*, *Ire-* "*land*, and other places, in her voy- "age from *New-England* to *London*, "the sum of 125*l.* And the said Mas- "ter also found that the plaintiff did at "the defendant *Paine*'s desire, and "by his direction employ the several "tradesmen named in the schedule to "do work and find provisions and ma- "terials for the said ship, since the 9th "of *March* 1715; and that the said "plaintiff, in confidence that he should "be continued master of the said ship, "did, for and on the defendant *Paine*'s "account, promise to pay to the said "several tradesmen for such work, pro- "visions and materials, the several sums "mentioned in the schedule, amount- "ing to 332*l.* 9*s.* 4½*d.* several of which "sums the said plaintiff had been sued "for and forced to pay.—And the said "Master also found, that since the 9th "of *March* 1715, the plaintiff disbursed "on the said ship's account, and there "became due to him, for his and men's "wages, further sums to the amount "of 84*l.* 16*s.* 9½*d.* which said several "sums of 125*l.* 332*l.* 8*s.* 4½*d.* and 84*l.* "16*s.* 9½*d.* were the whole of the "plaintiff's demands, to the payment "whereof the said Master conceived "the said ship was liable." The Mas- ter being directed to review his said re- port, certified that he saw no occasion to alter the same, but the cause being set down to be heard upon the said re- port, before the Master of the Rolls, his Honour declared "that the plaintiff's "demands of 332*l.* 8*s.* 4½*d.* paid to "tradesmen for work done, and for "providing provisions and materials "for the said ship, and so much of the "sum of 84*l.* 16*s.* 9½*d.* as was dis- "bursed by the said plaintiff on those "accounts, were *not* a lien on the said "ship, and dismissed the bill as to "them; but his Honour further de- "clared, that the said sum of 125*l.* and "so much of the said 84*l.* 16*s.* 9½*d.* as "was due for the wages of the plaintiff "and his seamen *were* a lien on the said "ship." Reg. Lib. B. 1725, fol. 477. The reason of taking the accounts with particular reference to the 9th of *March* 1715, appears to have been, that on that day the plaintiff was prevailed upon by the defendant *Paine* to give a receipt in full of all demands in respect of the said ship (although no money was in fact paid) in order to enable *Paine* to make the mortgage to *Bernadis- ton*; in consequence of which the plaintiff's demand was postponed to *Bernadiston*'s mortgage, as appears by the decree made on the original hear- ing of the cause. Reg. Lib. B. 1717, fol. 269.

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thus employed, or who finds these necessaries, must resort to the owner thereof for payment, and in such a case, in a suit in the Court of Admiralty to condemn the ship for non-payment of the money, the courts of law will grant a prohibition; and therefore, if the owner, after money thus laid out, mortgages the ship, though it be to one who has notice that the money was so laid out, and not paid, yet such mortgagee is well entitled, without being liable for any of the money thus laid out for the benefit of the ship as aforesaid, and the ship is no more liable for this money than a carpenter laying out money in the building of an house has a lien upon the house in respect thereof, though by the law of *Holland* he has; but this not being the law of *England*, such carpenter must resort to those who employed him, or to the owner of the house for his money.

But it is true, that if at sea where no treaty or contract can be made with the owner, the master employs any person to do work on the ship, or to new rig or repair the same, this, for necessity and encouragement of trade, is a lien upon the ship, and in such case the master by the maritime law is allowed to hypothecate the ship. (1)

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(1) Vide *Justin* v. *Ballam*, 1 Salk. 34. *Lister* v. *Baxter*, 2 Stra. 695. *Ex parte Shank*, 1 Atk. 234. *Buxton* v. *Snee*, 1 Vez. 154. *Samson* v. *Braginton*, 1 Vez. 443. *Wilkins* v. *Carmichael*, Doug. 101. (*z*)

(*z*) *Westerdell* v. *Dale*, 7 T. R. 312. *Hussey* v. *Christie*, 13 Ves. 594; 9 East, 426. *Wood* v. *Hamilton*, Abbott on Shipping, 140 n. *Smith* v. *Plummer*, 1 B. & A. 575. *Ex parte Halkett*, 2 Rose, 194, 229; 3 V. & B. 135; 19 Ves. 474.

JERVOISE *versus* O'CARROL.

CASE 108.

Lord Chancellor KING. An order for appearing gratis, implies the words "that the defendant shall pray no day over."

THE minutes of an order in this cause were taken differently in the two register books, in Mr. *Goldsborough's*, that the defendant should at the hearing appear *gratis*, and *pray no day over*, but in Mr. *Price's* book it was only, that the defendant should appear *gratis*, leaving out the latter part.

The order was drawn up with the latter part in it, that the defendant should appear *gratis*, and *pray no day over;* upon which a petition was exhibited for the leaving out of these

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latter words, and Mr. *Attorney General* insisting on the behalf of the petitioner, that the Court had given no order for inserting them,

Lord Chancellor asked Mr. *Attorney General*, what was the import of these words, *that the defendant shall appear gratis?*

Mr. *Attorney General:* These words are taken to supply the want of service of a *subpœna*, that the defendant should be as much bound to appear, as if proved he had been served, and are no more than admitting service.

Lord Chancellor: Consenting to an order that the defendant should appear *gratis* must mean, that he should appear, and is not to make default; so that the former words plainly imply the latter.

For which reason let the order stand as drawn up, and the petition be dismissed.

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CASE 109.

ATTORNEY GENERAL *versus* GILL.

Lord Chancellor KING.

2 Eq. Ca. Ab. 193. pl. 13. Devise of 100*l.* and of 50*l.* per annum to A. and his heirs, and if A. die without heirs; then to a charity. A. dies without issue, living the testator; the will void as to the whole, and the charity cannot take.

ONE by will devised an annuity of 50*l.* per annum, and also 100*l.* in money to *A.* and his heirs, and if *A.* died without heirs, then to a charity; *A.* died without issue in the life of the testator, and then the testator died, and an information was brought against the executors to establish the charity, to which the executors demurred.

Insisted for the demurrer, that this case came now as fully before the Court as it could do upon a hearing; and as to the money, the devise over after a death without issue was void; and with regard to the annuity it was urged, that the words *if* A. *died without heirs*, and not saying *heirs of his body*, but *heirs generally*, would be void; and that this was the difference in *Cro. Car.* 57. *Herne* versus *Allen*, that if the devisee over was a brother or cousin, or any person that was inheritable, in such case it being impossible that the first devisee should die without heir, while the devisee over, who was a brother or cousin should be living, this shewed the intention of the testator to be, that the words *dying without heir* must be understood, dying without *heir of his body; secus* if the devisee over was a brother by the half blood, or a stranger.

2*dly*, As to *A.* the devisee's dying in the life of the testator,

this was said to be wholly immaterial; for if the will was void at the making of it, subsequent accidents would not make it good; *quod ab initio non valet, tractu temporis non convalescet.*

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Mr. *Attorney contra:* 1*st*, A will ought to be taken agreeable to the intent, and such intent must be construed according to common parlance; a man is said to die without heirs, or to have no heir, when he is dead without issue, and this construction ought the rather to prevail in the present case, the remainder being limited to a charity.

2*dly*, Supposing the first devise to be in tail, since the devisee in tail is dead without issue in the life of the testator, the remainder (which in the present case is to the charity) ought to take presently; which the other side admitted.

3*dly*, The Court ought not to suffer this matter to be stifled on a demurrer, since it is possible the information itself may not have set out the will truly or fully, all which will appear at the hearing.

Lord Chancellor: If the information does not fully set out the will which gives this charity, it is your own fault; besides it will not conclude you, for you may amend your information (1).

As to what is said, that the devise of the remainder ought to be supported as given to a charity; supposing it void if given to a common person, so shall it be also when given to a charity. The devise being to *A.* and his heirs, and if *A.* die without heirs, to a charity, such devise over is void, and the word *heirs* shall not be construed to signify *heirs of the body*, where the devisee over is not inheritable. (2)

And the death of the first devisee in the life-time of the testator can make no alteration, if the will was void at the making.

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Lastly, This cause comes before the Court as fully upon the demurrer as it would do upon the hearing, and saves charges to the parties.

Wherefore allow the demurrer. (3)

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(1) Sed vide *Lord Coningsby* v. *Jekyll*, ante, 300.

(2) So, *Allen* v. *Spendlove*, 2 Eq. Ca. Ab. 305. pl. 2. *Nottingham* v. *Jennings*, ante, 1 vol. 23. *Tyte* v. *Willis*, Ca. temp. Tal. 1. *Tilburgh* v. *Barbut*, 1 Vez. 89. *Morgan* v. *Griffiths*, Cowp. 234. *Goodright* v. *Dunham*, Doug. 264.

(3) Reg. Lib. A. 1725, fol. 388.

CASE 110. DUKE OF CHANDOS *versus* TALBOT & Ux'.

Lord Chancellor KING.
Master of the Rolls.
2 Eq. Ca. Ab. 145. pl. 5.
Regularly the answer of a feme covert, if separate, ought to have an order to warrant it; but if the feme covert's separate answer be put in without an order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it, and replies to it, the Court will not at the motion of the wife, or of her executors, set it aside.

THE Duke of *Chandos* brought his bill against the defendants *Talbot* and his wife, to compel them to perform articles entered into by the husband for the sale of the manor of *Shaws* in the county of *Berks*, being the wife's inheritance, and late the estate of Sir *Thomas Doleman*, to whom she was heir.

The wife answered separately, insisting that she was not bound by the husband's articles, however, provided she might have 13,000*l.* of the purchase-money to dispose of to her separate use (the whole purchase-money being 20,000*l.*) and the timber to be valued, she was willing the sale should go on.

The defendant the husband also answered, and desired that the articles might be performed; the plaintiff replied to both the answers; and some of the relations of the wife insisting, that the wife's answer was gained by threats and fraud, it was by the Court referred to the Master, to examine how and in what manner this answer was gained from her; also

[372] There being no order for the wife's answering separately, it was referred to the Master, to state whether her answer was regularly put in or not.

The Master reported, that the defendant the feme covert did advise about the putting in of this answer, and was fully apprized thereof, and did it with great deliberation; and as to the matter of regularity, he reported, that it being put in separately, in her favour, at her desire, and with the consent of her husband, and the plaintiffs having accepted thereof, and replied thereto, he conceived it to be regular.

In the meantime the wife died, but before her death, exceptions to the Master's report were filed as to the regularity.

Lord Chancellor called to his assistance the *Master of the Rolls;* and on hearing counsel they both held, that in regard it was reported that the answer was put in by the wife deliberately, by good advice, that she was fully apprized thereof, consented thereto, and that it was done at her request, with the consent of her husband, and that the plaintiff had accepted of it, and replied to the same, therefore the feme covert, or any on her behalf could not assign that which was done in her favour, as an irregularity.

Duke of CHANDOS *v.* TALBOT.

And the *Master of the Rolls* instanced in the case of an essoin being granted to a defendant, where it ought not to have been, that there the defendant himself could not assign this for error, it being done in his favour; no more could the defendant the feme covert, or any on her behalf, object to her having put in a separate answer, when it appeared to have been for her advantage.

For which reason, the feme covert's answer was resolved to be regularly put in, and the exceptions to the Master's report over-ruled. (1) [373]

(1) Reg. Lib. A. 1725, fol. 416.

BLAKEWAY *versus* EARL OF STRAFFORD.

CASE 111.

Lord Chancellor KING. Sel. Ca. in Cha. 57. 2 Eq. Ca. Ab. 579. pl. 6. One owing a debt by simple contract barred by the statute of limitations, devises lands in trust to pay his debts. Qu. Whether the debt be revived by the will?

THE plaintiff brought his bill against the Earl of *Strafford*, as administrator with the will annexed of Sir *Henry Johnson*, to be paid out of assets, and shewed by his bill, that he was a sail-maker, and was employed by Sir *Henry* from 1696, to *July* 1707, to fit sail-cloths, and other tackle to Sir *Henry*'s ships, on which account Sir *Henry* was indebted to the plaintiff in 343*l.* and that in *December* 1714, the plaintiff received 50*l.* in part of his debt, and that Sir *Henry* died the 29th of *September* 1719, having made his will, and devised his lands to his executors *in trust to pay his debts*, and that his executors renouncing, the defendant the Earl of *Strafford* administered with the will annexed.

The defendant pleaded the statute of limitations, and that neither the defendant, nor (as he believed) Sir *Henry*, made any promise to pay the debt in question within six years before the bill brought.

For the plea it was said, 1*st*, that this plea of the statute ought not to be discouraged any more than that of the statute of fines; it being made equally for the quiet and repose of the subject, especially in the case of an executor or administrator, as the present case was, who might not be supposed to be able to prove payment, as the intestate, if alive, would have been.

2*dly*, That by the statute of limitations the debt was barred, extinct, and become as no debt, and therefore the will of Sir *Henry Johnson* subjecting the lands to the payment of his debts, must be construed to mean such debts as were then sub- [374]

BLAKEWAY *v.* Earl of STRAFFORD.

sisting, not stale demands barred by the statute, for that a contrary construction would give way for vexatious demands, and occasion people's raking up old dormant pretences.

On the other side it was argued, 1*st*, that the statute of limitations was far from extinguishing the debt, which was still subsisting, and to be barred only by pleading the statute, which the defendant was not bound to do; that it was plain the debt was not extinguished, because the very acknowledging of it, would revive and take it out of the statute.

2*dly*, That in this case Sir *Henry Johnson*'s having paid 50*l*. in 1714, in part of the debt was an acknowledgment that the rest was due, and that this was taking the case out of the statute, Sir *Henry* dying in 1719.

3*dly*, That the will of Sir *Henry* subjecting his lands to the payment of his debts did create a trust, which was not barred by the statute of limitations; and they cited the case of (*a*) *Staggers* versus *Welby*, where it was decreed by Lord *Cowper*, that such a will subjecting lands to the payment of debts did raise a trust, and revive a debt barred by the statute of limitations.

(*a*) Vide Salk. 154. 2 Vern. 141. Gofton versus Mill.

Lord Chancellor: I would be cautious of giving any relief against an act of parliament; but it is plain the debt is not extinguished by the statute of limitations, since the statute must be pleaded, which the defendant is not bound to do; and if he afterwards will acknowledge the debt, it takes it out of the statute.

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But let me be attended with the case of *Staggers* versus *Welby*; which accordingly was done; and thereupon his Lordship over-ruled this plea of the statute of limitations.

Upon an appeal brought in the House of Lords this decree was reversed, and the plea ordered to stand for an answer. (1)

(1) "With liberty to except, but "not to oblige the defendant to make "any discovery of the value or parti- "culars of the real or personal estate "appointed by the will of Sir *H. John-* "*son* for the payment of his debts, and "that the benefit of the plea should "be saved to the defendant, till the "hearing of the cause." 3 Bro. P. C. 305, to which case a note is subjoined that after a very diligent search at the Register-office, the author was not able to find any further proceedings in the cause. Vide *Jones* v. *Earl of Strafford*, post. 3 vol. 89. *Legastick* v. *Cowne*, Mos. 391. *Lacon* v. *Briggs*, 3 Atk. 107.

TERM. S. MICHAELIS, 1726.

1. Rep. t. H. 61.

METCALFE *versus* BECKWITH.

CASE 112.
At the Rolls.
2 Eq. Ca. Ab. 240. pl. 19. On a bill to settle the boundaries of a manor, it was decreed that each party should give to the other a note of their boundaries, and that it should be tried in a feigned issue. And the issue being found for the defendant on the first, second, and third trial, the defendant was not only allowed the costs of all the trials at law, but also the costs in equity, in regard the defendant had no bill, and the plaintiff might have tried it at law without coming into equity. On a bill of partition, no costs on either side, because it is for the benefit of both parties.

ON a bill to settle the boundaries of the manor of *Dale*, of which the plaintiff was lord, and of the manor of *Sale* which belonged to the defendant, the plaintiff and defendant insisting upon different boundaries, it was ordered that the parties should give a note to each other of their boundaries, and that the matter should be tried in a feigned issue. (1)

Whereupon a trial was had, in which the verdict was for the defendant, and afterwards a new trial granted, and after that a third trial, upon a certificate of the Judge, that the last was against evidence; and upon the third trial also the like verdict was found for the defendant, so that the boundaries appeared to be as they were given in by the defendant, and contrary to what had been alleged by the plaintiff's bill.

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And now upon the equity reserved, it coming on before the *Master of the Rolls*, it was urged for the plaintiff, that as to the costs of the three trials, the plaintiff must submit to pay them; but with regard to the suit in this Court the bill seemed to be in the nature of a bill of partition, where neither side pay costs, it being for the benefit of both parties, to have their shares in severalty, and that in the present case, there was by

(1) But in St. *Luke's* v. St. *Leonard's*, 1 Bro. C. C. 40. Lord *Thurlow* thought that a bill to settle boundaries of a *parish* would not lie, it being merely a question at law. (*z*)

(*z*) See *Atkins* v. *Hatton*, 2 Anst. 386. *Woolaston* v. *Wright*, 3 Anst. 801. *Wake* v. *Conyers*, 1 Eden, 331. 2 Cox, 360. *Speer* v. *Crawter*, 2 Mer. 410. *Miller* v. *Warmington*, 1 Jac. & W. 484.

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this trial a plain advantage to the defendant by the bounds of his manor being set out by this verdict, in the same way as they probably would have been in a bill of partition; for which reason the plaintiff ought to pay no costs, and the rather in this case, in regard the plaintiff had a probable cause of suit, and it must be presumed that at the hearing there was evidence on both sides; and therefore, to satisfy the conscience of the Court, it had been sent to a trial, under which circumstances it would be hard to make the plaintiff pay the charge of satisfying the conscience of the Court, when the thing was in its nature doubtful.

But for the defendant it was said, that the plaintiff's bill in this case ought to be dismissed, and the defendant having no bill, the dismission ought to be with costs; otherwise an encouragement might be given for great vexation, without any prospect of the least recompense.

Master of the Rolls: The objection that this bill was in nature of a bill of partition, seems to be of some weight (*z*); but as the defendant has no bill here, and the plaintiff might have tried this matter at law, and more especially since no part of the issue is found for the plaintiff, who is in the wrong *in toto*,

[378] why should he not be within the common rule, and pay costs throughout? Dismiss the bill with costs. (1)

(1) Reg. Lib. B. 1726. fol. 110.

(*z*) But see *Miller* v. *Warmington*, 1 Jac. & W. 493. The costs of a suit for partition were formerly borne equally by the parties; *Parker* v. *Gerard*, Amb. 236. *Hyde* v. *Hindly*, 2 Cox, 408; but are now divided between them in proportion to their interests. *Calmady* v. *Calmady*, 2 Ves. jun. 568. *Agar* v. *Fairfax*, 17 Ves. 555. *Baring* v. *Nash*, 1 V. & B. 554.

14 Ap. Ca. 284. 1911 2 Ch 304
42. Ch. D. 614.

CASE 113.

GYLES *versus* HALL.

Lord Chancellor KING.

As to a tender of mortgage money, there ought to be reasonable notice of paying it in; and if the tender be insisted on to stop interest, the money must be kept dead from that time, because the party is to be uncore prist. Six months notice given to pay in the mortgage-money at Lincoln's Inn Hall, though this be not the place mentioned in the proviso of the deed, yet where money was lent in town, and no objection made to the notice, no reason for a personal tender, or to make a man carry a great sum to a person in the country.

THE plaintiff's bill was to compel a re-assignment of a mortgage, and to stop the payment of interest from the 25th of *September* 1722, there having been then a tender made of 1000*l.* the mortgage-money and interest.

GYLES *v.* HALL.

It appeared that on the day before the 25th of *March* 1722, the mortgagor gave personal notice in writing to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning at *Lincoln's Inn Hall*, on the 25th of *September* 1722, which accordingly was done.

Object. by Solicitor General *Talbot*, *Lincoln's Inn Hall* is not named in the proviso in the mortgage deed, as the place for the payment of the money, and therefore the tender must be to the person. (1)

Lord Chancellor: The money being lent in town, and after personal notice given for the payment thereof, and no objection made by the mortgagee to the place at the time of the notice, it would be very hard to make the mortgagor travel with this great sum of money to *Oxford*, where the mortgagee lived.

But in this case it ought to appear, that the mortgagor from that time always kept the money ready; whereas the contrary [379] thereof being proved, that the mortgagor was not ready to pay it, therefore the interest must run on; and decree the defendant to re-assign to the mortgagor, or his order.

(1) A tender must be strictly made, in order to stop interest on a mortgage, *Bishop* v. *Church*, 2 Vez. 372. *Garforth* v. *Bradley*, 2 Vez. 678. *Shrapnell* v. *Blake*, 2 Eq. Ca. Ab. 603. pl. 34. et vide *Wiltshire* v. *Smith*, 3 Atk. 90.

——— TOWNSEND Plaintiff,

JOHN LAWTON sen', EDWARD LAWTON, JOHN LAWTON jun' and MONTAGUE. } Defendants.

CASE 114.

Lord Chancellor KING.

Sel. Ca. in Cha. 71. 2 Eq. Ca. Ab. 749. pl. 4.

On marriage, lands are settled to A. for 99 years, if he so long live, remainder to B. and his heirs during the life of A. to support contingent remainders, remainder to the first, &c. son of A. A. has two sons, C. and D. A. the father having mortgaged the premises, he and his son C. covenant to suffer a recovery, and to procure B. the trustee to join, B. the trustee by answer submits to the Court: the Court will not compel the trustee to join, unless D. the second son of the marriage will consent.

By a settlement on the marriage of the defendant *John Lawton* senior, lands were limited to his use for 99 years, if he should so long live, remainder to the defendant *Montague* and other trustees (of which *Montague* was the survivor) for the life of *John Lawton* senior, to preserve contingent remainders, remainder to his wife for life, remainder to the first and second, &c. sons of the marriage in tail male successively, remainders over.

TOWNSEND *v.* LAWTON.

The wife was dead, and the defendants *Edward Lawton* and *John Lawton* were the only issue of the marriage, and the defendant *John Lawton* the father having mortgaged the premises to the plaintiff, and the defendant *Edward Lawton* the son being come of age, the father and son entered into articles with the plaintiff, and thereby covenanted, that they would suffer a recovery, and procure Mr. *Montague* the surviving trustee to join therein: but,

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Mr. *Montague* refusing to join in making a tenant to the *præcipe*, the plaintiff brought this bill to compel a specific performance of the covenant, and that Mr. *Montague* might join in suffering the recovery.

Mr. *Montague* by answer submitted to do as the Court should direct, and *John Lawton* the younger son was made defendant.

Lord Chancellor asked if the younger brother would consent that the trustee should join in making a tenant to the *præcipe?* and being told *no;* his Lordship said, then he would not decree the trustee to join, for that he would not take away any man's right. (*z*)

(*a*) Vol. 1. 536. et vide Mansell & Mansell, post. 678.

Hereupon it was insisted, that the Court had done the like in the case of (*a*) Mr. *Winnington* the eldest son of Sir *Francis Winnington*, upon his son's marriage with Mrs. *Read*, where Mr. *Winnington* the father brought a bill against the trustee for preserving contingent remainders (he himself being only tenant for 99 years) to compel him to join in making a tenant to the *præcipe* for a common recovery, and the Court decreed he should do it, in order to make a new marriage settlement.

Lord Chancellor: I also would do so, were the like case to come before me; in the case cited, the trustee was decreed to join, in order to preserve the estate in the family; but in the principal case you would have the same done, with a view only to alien. Dismiss the bill as to Mr. *Montague* and the younger son with costs; but decree *John Lawton* the father, and *Edward* the son specifically to perform the covenant with the plaintiff. (1) (*y*)

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(1) This decree does not appear in the Register's book, although the order for setting down the cause is entered as of the preceding *Easter* term.

(*z*) See *Basset* v. *Clapham*, vol. 1. 358.

(*y*) But now the Court will not decree a defendant specifically to perform an agreement to do an act beyond his power or his right. *Crop* v. *Norton*,

DUKE OF DEVON *versus* ATKINS. CASE 115.

Lord Chancellor KING.

Sel. Ca. in Cha. 71.

An estate for three lives granted to A. his executors and administrators, is a personal estate, and will on A.'s death be liable to all his debts by simple contract as a lease for years would be.

AARON *Kinton* being seised of a leasehold estate for three lives, and having upon his daughter's marriage settled the same upon trustees, in trust to the daughter for her life, remainder to her husband, remainder in trust to her children, and for want of such children, then in trust to the said *Aaron* his executors and administrators; and the daughter being dead without leaving any child,

Aaron Kinton makes a will, and devises the reversion, which was thus reserved to himself and his executors, to his wife for life, and afterwards to his sister, and then to his sister's son, and dies.

On a bill brought by the Duke of *Devon*, who was a considerable creditor of *Aaron Kinton*, to charge this estate with his debts, it had been decreed by (*a*) Lord *Cowper*, that the reversion of this estate for lives reserved to *Aaron Kinton*, his executors and administrators, was by the statute of frauds and perjuries made personal estate, and being made such could not be devised away by the testator in prejudice of his creditors, but ought to be liable to his debts, and sold for that purpose.

(*a*) 2 Vern. 719.

But the devisee in remainder after the death of (*z*) *Aaron Kinton* the testator, not being made party to that suit, and the testator's wife the devisee for life being dead, he now brought this matter over again.

And it was insisted upon by *Talbot* Solicitor General, that though the remainder-man could not be bound by the former decree, not having been a party thereto, yet so far might that decree be made use of, to shew it to have been the opinion of that great man Lord *Cowper*, that an estate *pur auter vie*, when limited to executors, was personal estate, and as such, (*b*) distributable within the statute of distribution.

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(*b*) Vide Salk. 464. & Carth. 376. *Oldham* v. *Pickering*, contra. However, though in the Spiritual Court an estate *pur auter vie* be not distributable, on ac-

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2 Atk. 74. 9 Mod. 233. *Harnett* v. *Yielding*, 2 Sch. & L. 549. *Ellard* v. *Lord Llandaff*, 1 Ba. & Be. 244. *O'Rourke* v. *Percival*, 2 Ba. & Be. 58. *Howell* v. *George*, 1 Madd. 1. *Newdigate* v. *Helps*, 6 Madd. 133. And see the cases collected in the note to *Hall* v. *Hardy*, post. 3 vol. 189. As to the decree which may be made in such a case, see *Bennet College* v. *Carey*, 3 Bro. C. C. 390. *Greenaway* v. *Adams*, 12 Ves. 395.

(*z*) Lege "the death of *the wife of* A. K."

DUKE OF DEVON *v.* ATKINS.

Mr. *Attorney General:* Before the statute of frauds and perjuries, it is plain an estate *pur auter vie* was not considered as personal estate; and that statute says, that where it is limited to the heir, it shall not go to the executors or administrators. Put the case, that one seised in fee should convey to the use of himself for life, remainder to his executors, would that be personal assets? and if the executors are special occupants, or take by occupancy, then it cannot be assets.

Lord Chancellor: The case put of lands in fee being limited to executors, is different; here the executors and administrators are made special occupants and also take as executors, whereby the premises are personal estate as naturally as if limited originally to executors.

Wherefore I shall decree this to be personal estate, and consequently that it could not be devised away by the testator (2) from his creditors; nevertheless being a specific devise, all the rest of the testator's personal estate not specifically devised must be first applied to pay the debts, and if there be any other specific devise, the same ought to come in average with
[383] this and pay its proportion; (*z*) but if that will not serve, all must be sold to pay the testator's debts. (3)

count of its being a freehold, yet it seems as if in a court of equity it should be distributable, and that the administrator should be taken to be a trustee for general legacies, if any; and if no will, then for the next of kin: and as the administration may be granted to one only as principal creditor, he ought not to go away with the residue of the estate *pur auter vie,* as administrator. (1)

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(1) This case is now expressly provided for by stat. 14 Geo. 2. c. 20. s. 9. which enacts that the estate *pur auter vie* shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate. (*y*)

(2) So, an estate *pur auter vie* limited to *heirs* is within the statute of fraudulent devises, 3 & 4 W. & M. c. 14. and liable to specialty debts. *Westfaling* v. *Westfaling,* 3 Atk. 460.

(3) Reg. Lib. A. 1726. fol. 254. by the name of Duke of *Devon* v. *Dickens.*

(*z*) See note to *Hinton* v. *Pinke,* vol. 1. 540.

(*y*) See *Ripley* v. *Waterworth,* 7 Ves. 425. *Campbell* v. *Sandys,* 1 Sch. & L. 288. *Wellman* v. *Bowring,* 1 S. & S. 35.

BLACKLER *versus* WEBB & al'.

CASE 116.

Lord Chancellor KING.

2 Eq. Ca. Ab. 332. pl. 8. One having had five children, A. B. C. D. and E.; B. is dead leaving several children, and by will the testator devises the residue of his personal estate to his son A. and to B.'s children, and to his daughter C. and D.'s children, and to his daughter E.; D. is living and has children; decreed the children of B. and the children of D. shall take per capita, and not per stirpes, as if all named.

SAMUEL *Bagwell*, possessed of a considerable personal estate, and having had several children, some of whom being dead leaving children, made his will dated the 3d of *December* 1715, and after several legacies thereby given, bequeathed the surplus of his personal estate equally to his son *James*, and to his son *Peter*'s children, to his daughter *Traverse* and to his daughter *Webb*'s children, and his daughter *Man*, and made his son-in-law *Benjamin Traverse* sole executor.

The fact was, that at the making of the will the testator's son *Peter* was dead leaving several children, the testator's daughter *Hannah Webb* was living, but her husband was in low circumstances, and had been twice a bankrupt, and therefore the testator by his will made some provision for her separate use.

4. Bea. 240.
3. — 543.
10. Sim. 628.
1908. 1. Ch. 323.

The question was, how these children and grand-children should take, whether *per stirpes* or *per capita?*

Mr. *Solicitor General* insisted, that the grand-children should take *per stirpes*, it not being likely that the testator should intend his own children, his son *James* and his two daughters *Traverse* and *Man* to take no greater share of his personal estate than each of his grand-children, some of which were of very tender years and whose maintenance and subsistence would consequently require a very small expense; but that the construction in this case should be according to the statute of distribution of intestates' estates, where, in case of children taking, they take only the share of their deceased parent and as representatives of the stock.

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Mr. *Attorney General contra:* Such part of the surplus of the personal estate as is given to the grand-children must be the same, and have the same construction, as if the testator had particularized each grand-child by name, as *John*, *Thomas*, &c. when there could be no question but that the grand-children must have taken *per capita* and not *per stirpes*.

And as to the statute of distribution, it is not likely that the testator in this case understood the statute or the construction thereof, or had any allusion to it; neither could this will come within that part of the statute of distribution, in regard the testator's daughter *Webb* was living, and therefore her children could take nothing by representation within that statute.

BLACKLER *v.* WEBB.

To which it was added, that there was a particular reason why the children of the testator's daughter *Webb* were inserted in the will, because their father was in very low circumstances and unable to provide for them; and as to the testator's children, they all had portions given them before in his life-time; and this being additional, it was but reasonable that the grand-children should take an equal share of the surplus with the testator's own children.

Lord Chancellor at first seemed inclinable that the grand-children should take *per stirpes* only; yet at length he decreed
[385] that the testator's son *James*, and the children of the testator's deceased son *Peter* and his daughter *Traverse*, and the children of the testator's daughter *Webb*, and his daughter *Man*, (being in all fourteen in number) should each of them take *per capita*, as if all the grand-children had been named by their respective names; and that the grand-children could not take according to the statute, or in allusion thereto, forasmuch as the testator's daughter *Webb* was living, and so her children could not represent her; and to determine that the grand-children should take *per stirpes* would be to go too much out of the will, and contrary to the words, when the meaning of the testator might be according to his words, and that meaning a reasonable and sensible one. (1)

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(1) Reg. Lib. A. 1726. fol. 139. So *Weld* v. *Bradbury*, 2 Vern. 705. *Northey* v. *Strange*, *ante* 1 vol. 340. *Wicker* v. *Mitford*, Harg. Law Tracts, 513. *Malcolm* v. *Martin*, 3 Bro. C. C. 50. *Butler* v. *Stratton*, 3 Bro. C. C. 367. (*z*) So, in bequests to the *relations* or *next of kin* of the testator, the statute of distribution, though it furnishes the rule as to the objects of the bequest, yet does not determine in what proportions those objects shall take. *Thomas* v. *Hole*, Ca. temp. Tal. 251. *Green* v. *Howard*, 1 Bro. C. C. 31. *Phillips* v. *Garth*, 3 Bro. C. C. 64. *Rayner* v. *Mowbray*, 3 Bro. C. C. 234. (*y*)

(*z*) *Richardson* v. *Spraag*, ante, 1 vol. 434. *Lugar* v. *Harman*, 1 Cox, 250. *Eccard* v. *Brooke*, 2 Cox, 213. *Davenport* v. *Hanbury*, 3 Ves. 257. *Freeman* v. *Parsley*, 3 Ves. 421. *Longmore* v. *Broom*, 7 Ves. 124. *Barnes* v. *Patch*, 8 Ves. 604. *Ex parte Williams*, 1 J. & W. 91.

(*y*) See as to this point, *Anon.* vol. 1. 327.

LORD CLIFFORD'S CASE.

Case 117.

2 Rep. Ch. 65
2 Ch. Rep. 299

(*First Seal after* Michaelmas *Term, before the* Master of the Rolls, *in the absence of* Lord Chancellor.)

A SEQUESTRATION was granted, unless cause, against the defendant Lord *Clifford* for want of an answer; afterwards he put in an answer, which being reported insufficient, it was now moved for a sequestration absolutely, an insufficient answer being no answer, and in such case the plaintiff is to go on where he left off before the insufficient answer was put in.

Vide vol. 1. 535. Anonymus.
2 Eq. Ca. Ab. 711. pl. 5.
A sequestration nisi is the first process against a peer, or member of the house of commons, though this is some hardship; but if there be a sequestration nisi against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for sequestration shall not be absolute, but a new sequestration nisi.

Master of the Rolls: As in case of a peer, or member of the house of commons, it is an hardship upon them that a sequestration, which in some respects is in nature of an execution, is the first process; so when a sequestration is granted against a peer *nisi* for want of an answer, it is good cause against such order *nisi*, to shew that the answer is put in, which must be allowed for cause, and when that answer is reported insufficient, the plaintiff must move again *de novo* for a sequestration, *nisi*, which *Goldsborough* the Register said was the course of the Court. (1)

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(1) Vide *Butler* v. *Rashfield*, 3 Atk. 740, in which Lord *Hardwicke* doubted the propriety of this rule, although he pursued it in that instance. (*z*)

(*z*) S. C. nom. *Rashleigh* v. *Buller*, 1 Dick. 152. See *Gregor* v. *Lord Arundel*, 8 Ves. 87.

3 Ch. Ca. 767.
6 Sim. 403,
5 — . 204
9 Bea. 379.
1 Bea. 209.
2 Ch. Rep. 639,

SERLE *versus* ST. ELOY.

Case 118.

ONE seised in fee of lands near *Godalmin* in *Surry*, that were in mortgage, and likewise seised in fee of other lands, devised his lands in *Godalmin* to his cousin and god-daughter *Jane Styles* at her age of twenty-one, *subject to the incumbrances that were thereupon*, and ordered that the rents and profits of the premises should, during the infancy of his said god-daughter,

At the Rolls.
2 Eq. Ca. Ab. 375. pl. 25. 517. pl. 14.
One devises his lands in D. to A. (his cousin) an infant at her age of 21, subject to the incumbrances thereupon, and the rents during the infancy to be paid to her father, and devises all his other lands to trustees to pay his debts, the lands in D. being mortgaged, this mortgage shall be discharged by monies arising from the sale of other lands.

SERLE *v.* St. ELOY.

be paid to her father for her sole use, and devised other lands to trustees, in trust to pay the testator's debts. (1)

Obj. The lands in *Godalmin* are devised *subject to the incumbrances thereupon*, for which reason the devisee must take them *cum onere*, and be contented to pay off the mortgage.

Master of the Rolls contra: The devise of the estate subject to the incumbrance is no more than what is implied, for the testator could not do it otherwise; but when the testator devises other lands to pay his debts, this must be intended all his debts, and consequently the debt by mortgage of *Godalmin* is part of those debts which are to be paid off out of the money arising by sale of the trust-estate; and this is the stronger, by

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(1) By the Register's book this case appears thus—The testator began his will by "directing that his executor "should pay and discharge *all* his just "debts, and that he should raise suffi- "cient to pay the same—he then de- "vised his manor, &c. at *Godalmin* to "(the plaintiff) *Jane Styles* and her "heirs at her age of 21 or marriage, "*subject* nevertheless to the incum- "brances that were or should be upon "it at the time of his decease, and in "the mean time and until she should "arrive at her said age or marriage, "the rents, issues and profits to be "paid by his executor, into the hands "of her father or mother, which-ever "should be living at the time of the "testator's decease, for the plaintiff's "sole benefit and advantage.—He then "devised to his brother *Leonard Child*, "and his heirs, the reversion of the "manor of *W.* (after the death of "*M. F.*) *subject* nevertheless to the "payment of such of his debts as "should remain unpaid. And all the "rest of his real and personal estate "not therein before specifically dis- "posed of, he devised to (the defen- "dant) *John St. Eloy*, his heirs and "assigns, in trust the same to sell and "dispose of as soon as conveniently "might be after his decease, and there- "out to pay his debts and general lega- "cies; and in case there should be any "deficiency, and that any of his debts "and legacies should remain unpaid, "then he charged the same on the re- "version and inheritance of the manor "of *W.* and thereby directed the said "*Leonard Child*, and his heirs, to pay "off the same within six months after "the death of *M. F.* and he made the "said *John St. Eloy* sole executor." At the time of the testator's death, the manor, &c. at *Godalmin* were in mortgage to one *Hunt* for 500*l.* The bill having been amended in pursuance of the above-mentioned order, and the cause coming on to be heard before the Master of the Rolls, "his Honour de- "clared that all the debts and general "legacies of the testator were by his "will to be paid out of his personal "estate, and the real estates devised to "the defendants *St. Eloy* and *Child*, "and that the mortgage of the defen- "dant *Hunt* on the estate devised to "the plaintiff was to be taken as one "of those debts, &c." Reg. Lib. B. 1727. fol. 207. And this decree was afterwards affirmed on appeal (by *Leonard Child*) to Lord *King*, Reg. Lib. B. 1727. fol. 300. This case (although not always approved of) has been considered as a leading authority in *Galton* v. *Hancock*, 2 Atk. 437. Marchioness of *Tweedale* v. *Earl of Coventry*, 1 Bro. C. C. 240. *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454.(*y*)

(*y*) See *Howel* v. *Price*, *Clifton* v. *Burt*, vol. 1. 294, 679.

the testator's having appointed the rents and profits during the infancy of his god-daughter to be paid to the infant's father for the sole use of the infant, which is as much as to say, that they shall not go or be applied in discharge of the mortgage.

And though the infant by her own bill had submitted to pay off this mortgage, yet his Honour said, he must take care of the infant, and not suffer her to be caught by any mistake of her agent. (z)

Wherefore paying the costs of the day, let the infant amend her bill.

(z) So *Prichard* v. *Kinchant*, Mitf. 21.

ANONYMUS.

CASE 119.

NOTE; the course of the Court is, that where a cause is brought on upon bill and answer, and the plaintiff's bill is dismissed as against a defendant, in such case only 40*s.* costs is to be paid by the plaintiff; but if the plaintiff has a decree against the defendant, though upon bill and answer only, if the plaintiff has costs given him, it must be costs to be taxed. (1)

Where the cause is brought on only on bill and answer, if the bill is dismissed against any of the defendants, there only 40*s.* costs are to be paid; but if the plaintiff has a decree against the defendant, though only on bill and answer, there costs must be taxed.

(1) But this practice was altered by an order of *Lord Hardwicke* on the 27th of *April* 1748. Vide 2 Atk. 288.

9. Sim. 508.

PECK *versus* HALSEY.

CASE 120.

THE testatrix Mrs. *Peck* by her will *inter al'*, after legacies given to several of her relations, bequeathed to her two grandchildren *A.* and *B. some of her best linen*, and made *J. S.* residuary legatee.

At the Rolls. 2 Eq. Ca. Ab. 360. pl. 18. One bequeaths to her grandchild A. some of her best linen; this void for the uncertainty; yet the Court recommended it to the executor to give some of the best linen to the legatee.

Master of the Rolls: This is a void legacy for the uncertainty; the *best of my linen* is uncertain, but *some of my best* linen is more uncertain still; if it were such, or so much of my best linen, as they should choose, or as my executors should choose for them, this would be good, and by the choice of the

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A bequest of such of the best linen as the executor should think fit, or as the legatee should choose, had been good.

PECK v. HALSEY.

legatees or executors is reducible to a certainty, but in this case it is merely void for the uncertainty.

However, afterwards forasmuch as these were so near relations to the testatrix as grand-children, and having no other legacy by the will, and since it was plain the testatrix intended some linen, his Honour did by the decretal order recommend it to the residuary legatee, to give some of the best of the testatrix's linen to these legatees *A.* and *B.* which recommendation in the like cases (he said) the Court had sometimes made. (1)

(1) Reg. Lib. B. 1726. fol. 264. by the name of *Peck* v. *Peck*.

CASE 121.

CLAVERING *versus* CLAVERING.

Lord Chancellor KING.

Sel. Ca. in Cha. 79. Mose. 219. 2 Eq. Ca. Ab. 589. pl. 2. Tenant for life of coal mines may open new pits or shafts for the working the old vein of coals.

THE defendant was tenant for life of lands in *Durham*, but not without impeachment of waste; the plaintiff was the remainder-man in tail, and in these lands there were several mines of coals, which were open before the defendant the tenant for life came to the estate, and the tenant for life opened the earth in several places, but (as it was said) with design only to pursue the old vein of coals. And the plaintiff moved for an injunction to stay the defendant from opening the earth in any new place.

(96) 1 Ch. 538.

Lord Chancellor: This was determined in the great cause of *Hellier* v. *Twiford*, in which I was of counsel, the matter was tried at the assizes in *Devonshire* before Mr. Justice *Powel*, and held great part of the day; there it was proved by witnesses to be the course of the country, and a practice well known in those parts among the miners, that any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein; and that otherwise the working in the same mines would be impracticable, because the miners would be choked for want of air, if new holes should not be continually opened to let the air in to them; and the same vein of coal frequently runs a great way, and (as *Lord Chancellor* expressed it) the same mine of coals was very knowable and easy to be discerned; besides, that to stop the working might be the ruin of the colliery for ever; and in the present case it appeared that there was a fire engine kept by the tenant for life of these mines, which carried off the water, without which the mines would be lost, and the working of this fire-engine cost 40*l.* or 50*l.* a week.

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1914. 1 Ch. 916. 1916. 2 Ch. 492.

Hazardous to grant an injunction to stay the working of a coal mine.

CLAVERING *v.* CLAVERING.

One seised of lands wherein there are coal-mines not opened, settles the lands on A. in tail, remainder to B. for life, A. opens the mines, works them, and dies without issue; B. may continue working in all mines lawfully opened.

Then it was objected by the *Attorney General*, that these mines were not opened when the settlement was made; having been opened by the person who by that settlement claimed an estate-tail, and was since dead without issue, whereas the settlement gave only the benefit of the mines then opened to the tenant for life.

Sed per cur': It seems as if the tenant for life may work all mines which were lawfully opened by the precedent tenant in tail, though subsequent to the settlement.

So deny the injunction.

THOMAS DAVIS Lessee of JOHN PIERCE, Plaintiff; CRESWICK NORTON and MARY Ux'. Defendants.

CASE 122.

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A. seised in fee, has a son B. and a sister C. &c. and devises his lands to his son B. in tail general, and if his son B. should die without issue, and his wife should survive him, then the wife to have the premises for life, remainder to C. in fee; B. the son dies without issue, but testator's wife dies before him; C. is not entitled to the remainder in fee, because the contingency is annexed to all the devises over.

THIS was an ejectment tried at *Chelmsford* summer assizes 1726, and the lands in question being of small value, and depending merely on the words of a will, it was by consent made a case to be determined by the opinion of Mr. Justice *Reynolds*, who tried the cause.

10. Lev. 406.
14. Jac. 189.

The case was, *Thomas Hooker* the defendant's uncle was seised in fee of lands in *Seward-stone* in the parish of *Waltham-holy-cross*, in *Essex*, and had a wife *Alice*, an only son *William Hooker* and a sister *Mary Stratton*.

Thomas Hooker the father, by his will dated the 5th of *July* 1705, devised his lands to his son *William Hooker* and the heirs of his body, and if his said son should die without issue of his body, and the said testator's wife *Alice Hooker* should survive his the said testator's son, then the testator's wife *Alice* should enjoy the premises for her life, and after her decease, that the premises should be enjoyed by the testator's sister *Mary Stratton* for her life, and after her decease [the testator's son *William Hooker* being dead without issue as aforesaid] then the testator devised the premises to the lessor of the plaintiff *John Peirce*, and to two others *Pigborn* and *Randal* (both since dead) and to their assigns for ever. The testator *Thomas Hooker* died, the wife *Alice* did not survive the testator's son *William Hooker*, but died before him.

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DAVIS *v.* NORTON.

The 6th of *September* 1709, the son *William Hooker* died without issue; upon which *Mary Stratton* the testator's sister and heir entered, enjoyed the premises for her life, and died the 10th of *October* 1723.

Pigborn and *Randal* two of the devisees over in fee died, and the other devisee *John Peirce* survived, and was the lessor of the plaintiff; and the question was, whether *John Peirce* the surviving devisee took any thing by this devise, in regard *Alice Hooker* the testator's widow died in the life-time of the testator's son *William Hooker;* so the contingency of the son dying without issue in the life-time of the testator's wife had not happened, and whether this contingency was annexed to all the subsequent estates and limitations, and prevented any one of them from taking effect?

Objected by Serjeant *Baines*, 1*st*, That the remainder devised to *Alice Hooker* the testator's widow was a vested, and not a contingent remainder;

2*dly*, That if the remainder to the testator's widow was a contingent remainder, yet this contingency did not extend to the subsequent limitations; but the devise to the lessor of the plaintiff (*Pierce*) was to be taken as a substantive devise, without any regard had to the contingency of the testator's son dying without issue in the life-time of the testator's wife; that the principal case did not differ from the case of a devise to my son in tail, and for want of issue of my son the remainder
[392] to my wife, or of a devise to my son and the heirs of his body, and if he die without issue, then the remainder to my wife; in which case the words [if] or [then †] would be insignificant, and no more than the law implied, *& expressio eorum quæ tacite insunt nihil operatur;* and that in the limitation of the remainder to the wife for her life, the words [in case she be living at the time of the son's dying without issue] must plainly be immaterial and insignificant; for if the testator's wife was not then living, she could not take; and it was the stronger, as it was but an estate for life which was given to the wife, and was the same thing as if the devise were to *A.* for life, and if *B.* survives *A.* then to *B.* for life, in which case this would be a vested remainder in *B.* and the words [if *B.* survives *A.*] would be void, and no more than implied, because *B.* could not take unless he survived *A.*

† *When* and *Then* are adverbs of time, and when they refer to a thing that must of necessity happen, as when an infant might come to twenty-one, then these words do not make a contingent remainder, 3 Co. 21. a. *Boraston*'s case; but in this case it is wholly uncertain whether the son should die without issue in the life of the mother, and therefore not within the rule of *Boraston*'s case.

Or supposing this to be a precedent condition, or a precedent contingency to the vesting of the estate for life to *Alice* the testator's wife, yet the devise of the remainder in fee to *Peirce* and the two others upon the death of the testator's son without issue, was a good substantive devise, and consequently the lessor of the plaintiff well entitled.

Mr. Justice *Reynolds:* If the devise had been to the testator's son and the heirs of his body, and if the testator's son should die without issue, and the testator's wife should survive him, then to the wife for her life, it might be reasonable to take it to be a vested and a common remainder to the testator's [393] wife, upon the son's dying without issue; but as it would have been plainly otherwise, if the devise had been to the wife in *tail,* or in *fee,* in case the son should die without issue, and the testator's wife should be then living; so in the present case it is the same as if the devise upon this contingency had been to the testator's wife in *fee,* because all these remainders are but as one estate arising upon the same contingency, and as from one root.

Moreover this devise to *Peirce* and the two others in fee, on the testator's son dying without issue, cannot be taken as a substantive devise, because the devise is to *Peirce* and the two others in fee, the testator's son being dead without issue *as aforesaid;* which words [as aforesaid] imply as in manner aforesaid, or as if these words had been repeated, (viz.) in case my son dies without issue, my wife then living; for which reason the contingency not happening, the devise to *Peirce* and the two others is void; and if this were but doubtful, yet by doubtful words an heir ought not to be disinherited.

Whereupon the Judge, after some days taken in considering of the case, delivered out the *postea* to the defendant, with these words subscribed,

I am of opinion, that the remainder limited to the lessor of the plaintiff by the will of *Thomas Hooker* is a contingent remainder depending on the death of *William Hooker* without issue in the life of *Alice* the testator's wife; and as that contingency never happened, the remainder which depended thereon could never arise; therefore let the associate deliver the *postea* [394] in this case to the defendants or their attorney.

Dec. 19, 1726. *James Reynolds.* (1)

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(1) Vide *Napper* v. *Sanders,* Hutt. 245. pl. 10. *Andrews* v. *Fulham,* 119. *Jones* v. *Westcomb,* 1 Eq. Ca. Ab. 2 Stra. 1092. *Gulliver* v. *Wicket,*

CASE 123. ANONYMUS. (On Petition.)

Lord Chancellor KING.

Creditor coming in under a commission of bankruptcy, though only to prove his debt and oppose the bankrupt's obtaining his certificate, yet he shall not sue the bankrupt at law, unless he will waive all benefit of the commission, not only as to the dividends but as to his voting against the bankrupt's gaining his certificate.

UPON the petition of a bankrupt complaining that *A.* one of his creditors had come in under the commission and proved his debt, yet had arrested the bankrupt, and praying to be discharged: the counsel of the other side insisted, that by the statute of the 13 *Eliz. cap.* 7, it is enacted, that if a creditor be not fully satisfied out of the bankrupt's effects, he may notwithstanding take his course at law against the bankrupt for the residue of his debt, and though by the 1 *Ann. cap.* 12, if the bankrupt has his certificate signed by four fifths (*x*) in number and value of his creditors, and allowed by the *Lord Chancellor*, then, and not otherwise, the bankrupt is discharged of his debts, yet in this case the bankrupt was not within the latter statute, so as to have his debts discharged, he having not got his certificate allowed, and was within the statute of the 13 *Eliz.* liable to be sued by the creditor for the debt, especially in this case, the creditor coming into the commission for no other reason but to oppose the bankrupt's having his certificate, which he would have had, if the creditor had not come in and proved his debt.

That the creditor was willing to waive taking any advantage of the bankrupt's effects or estate, and therefore it was fit he should be at liberty to sue the bankrupt at law, he not having
[395] got any certificate, otherwise the creditor might be under a *dilemma*, if he had not come in, the bankrupt would have gained his certificate signed by four fifths of his creditors in number and value, and now he had come in, though for no other end than to oppose the bankrupt's having the certificate, yet

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1 Wils. 105. (*z*) *Avelyn* v. *Ward*, 1 Vez. 420. *Lethieullier* v. *Tracy*, 3 Atk. 774. *Statham* v. *Bell*, Cowp. 40. *Bradford* v. *Foley*, Dougl. 63. *Doe* v. *Shippard*, Dougl. 75. *Horton* v. *Whittaker*, 1 T. R. 346. *Calthorpe* v. *Gough*, 3 Bro. C. C. 395. note. *Doo* v. *Brabant*, 3 Bro. C. C. 393. (*y*)

(*z*) In K. B. contrary to the opinion of the Court of C. P. on the same will in *Roe* v. *Wickett*, Willes, 303.

(*y*) S. C. in K. B. 4 T. R. 706.

(*x*) This number was retained in st. 5 G. 2. c. 30. but reduced by 49 G. 3. c. 121. s. 18. to three fifths. By stat. 6 G. 4. c. 16. s. 122, the signatures of four fifths in number and value of such creditors as have proved debts to the amount of 20*l.* are again made necessary in the first instance; but after six calendar months from the last examination of the bankrupt, the signatures of three fifths in number and value or nine tenths in number of such creditors are sufficient.

endeavours were used to deprive him of the benefit of the law against the bankrupt. ANONYMUS.

Lord Chancellor: It has been the construction of the court of equity, upon the latter statute which discharges the bankrupt of his debts, on his procuring a certificate signed by four fifths of his creditors, and allowed by the Chancellor, that where a trader becomes a bankrupt, and any one of his creditors comes in before the commission to prove his debt, though with design only to oppose the bankrupt's certificate, yet this proceeding of the creditor is an election to take his remedy for his debt under the commission, and if pending that, the creditor sues and arrests the bankrupt, it is taken to be an oppression. Therefore let the creditor at his own expense discharge the bankrupt out of custody.

But if such creditor will waive having any benefit under the statute, stay a reasonable time, and there is an improbability of the bankrupt's being able to gain his certificate signed by four fifths in number and value of his creditors, or allowed by the Court, in such case, if the creditor applies to the Court, declaring his consent to waive any right or share of the bankrupt's estate under the commission, and praying that he may sue the bankrupt, I think it might be reasonable for the Court to give leave to such creditor to proceed at law against the bankrupt for his debt. (1)

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(1) However it is now settled that although the creditor elect to proceed at law, he may still come in under the commission and prove his debt for the purpose of assenting to or dissenting from the certificate. Ex parte *Capot*, 1 Atk. 219. Ex parte *Lindsey*, 1 Atk. 220. (*z*)

(*z*) But at present by stat. 6 G. 4. c. 16. s. 59, no creditor who has brought any action, &c. against any bankrupt in respect of a demand which might have been proved under the commission, shall prove a debt, or have any claim entered on the proceedings under such commission, without relinquishing such action, &c., and the proving or claiming a debt shall be deemed an election to take the benefit of such commission with respect to the debt so proved or claimed. This section follows the effect of st. 49. G. 3. c. 121. s. 14, upon the construction of which the following cases were decided. *Ex parte Woolley*, 1 Rose, 394. 2 V. & B. 253. *Linging* v. *Comyn*, 2 Taunt. 246. *Ex parte Dickson*, 1 Rose 98. *Ex parte Bozannet*, 1 Rose, 181. *Ex parte Hardenbergh*, ibid. 204. *Watson* v. *Medex*, 1 B. & A. 121. *Harley* v. *Greenwood*, 5 B. & A. 95. *Ex parte Joseph*, 1 Rose, 184, 18 Ves. 340. *Read* v. *Sowerby*, 3 M. & S. 78. *Ex parte Lord*, 2 Rose, 421. *Ex parte Irving*, Buck, 423. *Bradley* v. *Millar*, 1 Rose, 273. *Ex parte Stanborough*, 5 Madd. 89. *Heath* v. *Hall*, 4 Taunt. 326. *Young* v. *Hunter*, 16 East, 252. *Ex parte Bolton*, Buck, 12. *Ex parte Read*, 1 V. & B. 346, 1 Rose, 460. *Ex parte Prowse*, 1 G. & J. 92. *Ex parte Frith*, 1 G. & J. 165.

CASE 124. *Ex parte* of the EAST-INDIA COMPANY.

Lord Chancellor KING.

2 Eq. Ca. Ab. 105. pl. 4.

Regularly speaking, at common law, none should come in on a commission of bankruptcy but such as were creditors at the time of the bankruptcy, because the bankrupt could not afterwards charge his estate. But now (since the 7 Geo. 1. cap. 31.) if A. gives a note under hand payable at a future day, before which day A. becomes a bankrupt; in this case such creditor by note shall come in. But a contract by A. at an East-India sale to buy a parcel of goods, before which day A. becomes a bankrupt, this not within the above-mentioned statute: neither is a bond or note to pay money on a contingency, before the happening of which contingency the obligor or giver of the note becomes a bankrupt, within the said statute.

A TRADER contracted with the Company at one of their sales for the purchase of a parcel of *East-India* goods, to be paid for at a future day, and before the day of payment he became a bankrupt.

Lord Chancellor: Formerly in case a trader contracted a debt payable at a future day, and afterwards (but before the day of payment) became a bankrupt, this not being a debt until after the bankruptcy, at which time the bankrupt could not do any act to alien or lessen his estate to the prejudice of his creditors, such contract was held void, and the creditor not allowed to come in for a satisfaction under the commission.

And in some cases it was thought hard, that if one, on the buying of goods, or for other valuable consideration, should give a note under his hand payable at a future day, and actually had the goods delivered to him, or the money lent him, and before the day of payment the debtor should become a bankrupt, that in this case the creditor could not come in under the commission with the rest of the creditors; wherefore for the remedying of this, the statute of 7 *Geo.* 1. *cap.* 31, was made. But the present case is not within that statute, because the goods were not delivered, nor was the contract signed by the party. (*a*)

[397] And at this day, if a bond or note be given by a trader upon a contingency, and before it happens the trader becomes a bankrupt, and then the contingency happens; this is not within

(*a*) See the statute in which there are no express words to this purpose. (1)

(1) Et vide contra *Pattison* v. *Banks,* Cowp. 540. *Brooks* v. *Lloyd,* 1 T. R. 17. (*z*)

(*z*) But by st. 49. G. 3. c. 121. s. 9, debts due at a future day on contract without writing were made proveable, as they are now by st. 6. G. 4. c. 16. s. 51. It seems, however, that the contract in the principal case was void by the st. of Frauds, 29 Car. 2. c. 3. s. 17., the goods not having been delivered.

the act, neither shall the debt arising (*a*) after the bankruptcy be satisfied under the commission.

Ex parte The East India Company.

(*a*) But if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in *pro rata*. Vide post. 497. Ex parte *Caswell, &c.* (*z*)

(*z*) But see now the st. 6. G. 4. c. 16. s. 56.

BAYS *versus* BIRD.

Case 125.

Lord Chancellor King. 2 Eq. Ca. Ab. 746. pl. 5. A. seised in fee of land demised the premises to trustees B. C. and D. for 500 years in trust to pay debts and for a charity, upon which premises there was a great quantity of timber growing, and the term was not without impeachment of waste.

Mr. *Zouch* late of *Odyham* in the county of *Hants* deceased, by deed of settlement in 1702, created a term of 500 years in the manor of *Odyham*, and the wastes and commons there, in trustees the defendants *Field*, *Jervoise* and *Redyard*, in trust to pay debts, and for a charity, upon which premises there was a great quantity of timber growing, and the term was not without impeachment of waste.

to pay debts and for a charity; B. one of the trustees being in possession, and as a receiver appointed by the Court, cuts down 1000*l.* worth of timber, D. one of the other trustees consenting; B. the trustee for the charity or as receiver, ought not to take advantage of his having possession, without which he could not cut down the timber, yet the timber must be valued according to what it would be worth at the end of the term of 500 years.

Upon *Zouch*'s death the reversion descended to his heir, who sold the reversion and inheritance to *Field* one of the trustees of the term, who was also appointed receiver of the estate by the Court.

Field cut down from the wastes and commons of the premises above 1800*l.* worth of timber, but left sufficient for repairs and botes for the tenants.

The question was, whether the defendant *Field* should make any, and what satisfaction to the trust for the timber which he had cut down? [398]

Obj. For the charity: Though the timber was part of the inheritance, and *Field* was owner of the inheritance, yet if he had not been a trustee of the term nor receiver of the estate, he could not have justified entering upon the premises during the term to cut down any timber; and it was compared to a copyhold, where, though the right to the timber be in the lord, yet cannot the lord enter to cut it down; and though the timber if blown down would belong to the lord, or to the owner of

A trustee of a term for a charity, subject to waste, purchases the reversion in fee; he shall not cut down the timber, if he does, he must make satisfaction to the charity.

BAYS *v.* BIRD. the inheritance, yet this would be the act of God; but the lord or reversioner cannot by his own act entitle himself to the timber, which in the present case ought to be estimated according to the rate and value it would yield at the end of the term of 500 years, at which time, if standing, it would however be decayed and rotten and of little value; and though the defendant *Field* was a trustee, he ought not to make use of that possession to the prejudice of the trust, much less make an ill use of the possession he had as receiver, that being to be looked upon as the hand of the Court, and therefore the Court ought to make him pay as much as it would have been worth his while to have given the other trustees for their leave, if it had been asked for the cutting down this timber, which ought (it was said) to be half, and that it would be very well worth the defendant *Field*'s while to give half for such license, in regard whatever he got thereby was clear gain, and the termors had a special property in the trees, as to the mast and shade. (1)

[399] Upon this it was proved by *Field*, that *Redyard*, another of the trustees, gave him leave to cut down the timber; and as to the termor's property of the mast and shade, it would hardly satisfy the charity to have an issue to try the value of the mast or shade during the term.

That during the term, and before the end thereof, it was likely by some tempest or accident the trees might be blown down, and then *Field* would be entitled thereto; also that this being a common or waste, (and not inclosures) the jury would give but little damages for the lessor's entering upon the land and cutting the timber.

Lord Chancellor: It is plain that *Field* as the purchaser of the reversion could not enter upon the premises to cut down the timber; and as to *Redyard* the co-trustee's assent to the cutting down of the timber it was a breach of trust in him, of which the defendant *Field* ought not to take any advantage, so that something ought to be paid to the charity or trust for their leave.

And on his Lordship's proposing 220*l.* both parties agreed thereto, and so the matter was compromised. (2)

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(1) Vide *Bewick* v. *Whitfield*, post. 3 vol. 267.

(2) It seems from Reg. Lib. A. 1726. fol. 111. that on hearing an exception to the Master's report, as to certain allowances made to *Field* for repairs done to the trust-estate amounting to between 400*l.* and 500*l.* and the special matter of the report respecting the cutting the timber coming on to be heard at the same time, *Field offered to allow* the sum of 200*l.* for the tim-

Another point arose in this case, which was, that the said Mr. *Zouch* by his deed in 1702, granted his hundred and manor of *Odyham* in *Hampshire*, and his manor of *Woking* in *Surry*, and all his manors, lands and premises in *Odyham* and *Woking* aforesaid. Whereupon,

What passes by grant of an hundred.

The question was, whether the grantor's manor of *Hartlerow*, which was within the hundred of *Odyham*, but not within the manor of *Odyham* or *Woking*, should pass by this deed? and after debate,

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One seised in fee of an hundred and of lands in the hundred, grants the hundred; this passes only the franchise, and not the lands in the hundred.

Lord Chancellor: An hundred is only a franchise consisting of a court called the hundred court, and probably has the return of writs, and by such grant the franchise passes, but not all the testator's lands within that franchise; (z) wherefore by the word [hundred] the manor of *Hartlerow* not being named in the grant, does not pass, and the rather in regard I heard it said and offered to be made out, that the manor of *Hartlerow* and the hundred and manor of *Odyham* came to Mr. *Zouch*'s family by different purchases, and at different times; but where Mr. *Zouch* grants his hundred and manor of *Odyham*, and his manor of *Woking*, and all his manors, lands and tenements in *Odyham* and *Woking* aforesaid, the words [*Odyham* aforesaid] must have reference to, and intend the hundred of *Odyham*, especially as the grant is of all the grantor's manors and lands in *Odyham* aforesaid, so that though there may be a manor within a manor, yet it is not likely that *Hartlerow* manor should be a manor within the manor of *Odyham*, nor is it pretended so to be, neither does it appear that *Odyham* is mentioned as a vill in the deed, but only as an hundred and manor.

But it being observed, that *Woking* was named as well as *Odyham;* whereas *Woking* could not be intended as an hundred, but rather as a vill, and so must *Odyham* when coupled together,

Lord Chancellor: Then let this be tried in a feigned issue at the next assizes for *Hants*, whether comprised or not com-

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ber, *whereupon* the exception was allowed as to the sum of 200*l.* and overruled as to the rest. But an appeal from this order (as well as the other order reported above) was brought in the House of Lords, which came on to be heard the 5th of *Feb.* 1730. by the name of *Jervoise* v. *Field*, when the sum of 742*l.* 12*s.* was ordered to be paid by *Field* to the charity, as a satisfaction for cutting down the timber, which sum of 742*l.* 12*s.* together with the 200*l.* before allowed, was exactly half the clear money for which the timber was sold. Printed case in Dom. Proc.

(z) See *Athyns* v. *Clare*, 1 Vent. 399.

BAYS *v.* BIRD. prised within this grant of 1702; and let Mr. *Field* be defendant, and the rest of the trustees plaintiffs, and let the deed be admitted to have been executed by *Zouch*, and that *Zouch* was at that time seised of lands in *Hartlerow*.

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3. Tu. & Cr. 160.
6. Sim. 638.
2. Tu. & Keen. 413.

DE TERM. S. HILLARII, 1726.

CASE 126. SIR JOHN NAPIER *versus* LADY EFFINGHAM.

Lord Chancellor KING.
Master of the Rolls.

Upon a decree against an infant, unless cause within six months after he comes to age, the infant may answer, make a defence, and examine witnesses anew.

SIR *John Napier* nephew and heir of Sir *Theophilus Napier* the first husband of the defendant Lady *Effingham*, (who after the death of Sir *Theophilus* married and survived Lord *Effingham*) brought his bill against the Lady *Effingham* (*inter al'*) to be relieved against a conveyance gained unduly by Lady *Effingham* from her first husband Sir *Theophilus Napier*, whereby he settled divers lands lying in the middle of his estate, and likewise the manor of *Shitlington*, a manor that had been long in the family, of which there are about 200 tenants, and this manor named in the middle of the parcels, amounting in the whole to above 600*l.* per annum; whereas the defendant by her answer admitted, that the lands agreed by Sir *Theophilus* to be settled were not above 400*l.* per annum.

And the defendant Lady *Effingham* preferred her cross bill (*inter al'*) to establish this settlement.

[402] Lord Chancellor *Parker* (among other things) referred this matter to be stated by the Master; and afterwards the plaintiff Sir *John Napier*, an infant, exhibited his petition to his Lordship for leave to bring a new bill, shewing that his cause had been mismanaged by his former solicitor, and making out the same by affidavits, upon which the Court gave leave to bring such new bill.

But the defendant Lady *Effingham* appealing from this order to the House of Lords, she was let into the possession of the

premises, but leave was given the plaintiff to shew cause within six months after he should come of age. (1) (z)

And now Sir *John Napier* petitioning the Court that he might have leave to amend his original bill, or be allowed to bring a new or supplemental bill as he should be advised, and also to amend his answer to the cross-bill;

Lord Chancellor called to his assistance the *Master of the Rolls*, and after hearing counsel on both sides, this day the opinion of the Court was delivered.

As to what is prayed concerning amending the original bill, there does not appear to be any precedent in this Court of an amendment to a bill in a part wherein it has been dismissed upon the merits.

The plaintiff Sir *John Napier*, now he is of age, ought to be well advised how he goes on in this cause, as it is insisted at the bar that there was a particular given in by Sir *Theophilus* for instructing counsel to draw the settlement in question, which comprised this manor of *Shitlington*.

But as to the present question concerning the manner in [403] which the plaintiff ought to shew cause, and bring this matter before the Court, it is not to be imagined that Sir *John* is tied up to the former proceedings only, for that would be the most imperfect relief which could be given.

Therefore this cause is to be considered as if there had been a common decree against an infant relating to his inheritance, with a *nisi causa* within six months after he should come of age, in which case it would be plain the defendant might amend his answer.

All infant defendants by their answers put in an early claim to the care and protection of the Court in relation to their right, and ought to have it, forasmuch as they are supposed unable to take care of themselves; which arises from the general superintendency this Court has over infants; all decrees against them give six months after they come of age, to shew cause; and therefore Sir *John Napier* in the present case ought to have leave to put in a new answer. (2)

And the *Master of the Rolls* said, he looked upon this as a

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(1) 3 Bro. P. C. 1. (2) This order was affirmed on appeal to the House of Lords, 3 Bro. P. C. 301.

(z) See *Gregory* v. *Molesworth*, 3 Atk. 627.

NAPIER *v.* Lady EFFINGHAM.

matter of course and of right, (*z*) believing that he had granted the same upon a petition *ex parte*. (1)

Note; The consequence of an infant's putting in a new answer is, that he may examine witnesses a-new to prove his defence, which may be different from what it was before. (*y*)

(1) Vide *Fountain* v. *Cain*, ante vol. 1. 504. *Bennet* v. *Lee*, 2 Atk. 531.

(*z*) So *Anon.* Mose. 67. (*y*) See *Savage* v. *Carroll*, 1 Ba. & Be. 548.

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CASE 127.

GARDINER *versus* GRIFFITH.

Lord Chancellor KING. Mose. 16. If an advowson only be mortgaged and becomes void, it seems in this case the mortgagee is to present, especially if in the deed the agreement be that the mortgagee shall present.

SAMUEL *Gardiner* the plaintiff's father, being possessed of a long term for ninety-nine years of the advowson of *Eckington*, made a mortgage thereof to the defendant by way of assignment of the term, upon condition to be void on payment of the mortgage-money and interest at the end of the year, and there was a covenant in the mortgage-deed that on every avoidance of the church the mortgagee should present.

Several years after the mortgagor died.

One mortgages a manor with an advowson appendant, and the church becomes void, mortgagee, though in possession, shall not present to the church till the mortgage is foreclosed.

It was admitted by *Lord Chancellor* and by the counsel on both sides, that if there be a mortgage made of a manor, and an advowson appendant, before the mortgage is foreclosed (though the mortgagee be in possession) yet the mortgagor shall present if the church becomes void, for the presentation is to be presumed to yield no profit, and consequently cannot be accounted for, nor go towards satisfaction of the mortgage; for which was cited *Wood* and *Hinchman* versus Sir *Thomas Stanley*, and also Mr. Serjeant *Selby*'s case. (*a*) (*z*)

(*a*) See also 2 Vern. 401. Amherst versus Dawling; 2 Vern. 549. Attorney General versus Hesketh; and Preced. in Chan. 71. Jory versus Cox.

But the principal case was said to differ, nothing being mortgaged here but the advowson, so that the mortgagee could have no other satisfaction than by providing for a child,

(*z*) Com. Rep. 343. nom. *Gally* v. *Serjeant Selby*, S. C. 2 Freem. 273. nom. *Dimock's* case, or *Hobart* v. *Selby*. See also *Thexton* v. *Betts*, 2 Freem. 87. So, the assignees of a bankrupt patron shall not present to a vacant benefice. St. 6. G. 4. c. 16. s. 77.

relation or friend on the advowson's becoming void, and the rather for that it was the express agreement in the mortgage-deed, that as often as the church should become void the mortgagee should present, which express agreement would be good even in a case of a mortgage of a manor with an advowson appendant, and this was still stronger, as it was the case of a perishing term, where every presentee or incumbent would have an estate for life in the church; to which the Court, though it gave no opinion, yet seemed to incline. (1)

[405]

Mortgagee of an advowson presents; bill by mortgagor must be brought within six months, in the same manner as a quare impedit.

But it appearing, that this bill against the mortgagee and his presentee was brought seven months after institution, *Lord Chancellor* dismissed the bill, declaring that as a *quare impedit* was confined to the six months after the death of the last incumbent, so the bill seeking to compel the defendant to resign, and consequently to deprive him of his living, ought by the same reason to be limited to the same time; and the relieving against this would be to relieve against an act of parliament, which had punctually been observed for some hundreds of years, ever since the 13th of *Edward* I. and that the *tempus semestre* ought to be as much observed here as at law, in regard it tended to the peace of the church. (2)

Indeed, had a *quare impedit* been brought within the six months, and the bill been preferred after the six months, the Court might, on a proper case, give directions in aid of the *quare impedit*, that the mortgage should not be given in evidence, &c. but here there was no *quare impedit* brought, and the bill came out of time. Wherefore

Per cur', dismiss the bill as to that part which seeks to compel the defendant to resign his living; but let the plaintiff redeem the mortgage on payment of principal, interest and costs. (3)

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(1) Vide *Mackensie* v. *Robinson*, 3 Atk. 559.

(2) *Boteler* v. *Allington*, 3 Atk. 458. (*z*)

(3) This decree was affirmed on appeal to the House of Lords, Vide 3 Atk. 559.

(*z*) *Mutter* v. *Chauvel*, 1 Mer. 475.

CASE 128. ANONYMUS.

Lord Chancellor KING.

A witness examined at a commission swears reflecting words, yet he ought not to pay costs, it being the commissioner's fault to take down such depositions.

A WITNESS examined for the defendant on one of the interrogatories deposed several things very reflecting upon ———, as that he was a vexatious man, and a stirrer up of suits, &c. for which the witness was ordered to pay costs.

And now Mr. *Melmoth* seconded by the *Attorney General* moved the *Lord Chancellor* to discharge that order, insisting it was more the commissioner's fault, who upon the commission in the country, took these depositions, than the witness's; for the witness might be an ignorant person, and not know what was proper to put down or depose; but the commissioner must be supposed to understand this, and therefore if an answer be reported scandalous or impertinent, the costs by the rule of the Court are to lie upon the counsel.

Lord Chancellor: I find the commissioners on both sides attended at the examination, and since it was the commissioner's fault to take down any deposition that was scandalous or impertinent, therefore discharge the order.

Quære, If the interrogatory had led to it? for it seems in the principal case it did not, it being the last general interrogatory. (*z*)

(*z*) *Cocks* v. *Worthington*, 2 Atk. 235.

TERM. PASCHÆ, 1727.

Ex parte LEFEBVRE.

CASE 129.

Lord Chancellor KING.
2 Eq. Ca. Ab. 116. pl. 4.

A. GIVES a promissory note payable to *B.* or order for 200*l.* value received, *B.* indorses it to *C.* who indorses it over to *D.*

A. gives a promissory note for 200*l.* payable to B. or order, B. indorses it to C. who indorses it to D. A. B. and C. becomes bankrupts, and D. receives 5*s.* in the pound on a dividend made by the assignees against A. D. shall come in as a creditor for 150*l.* only out of B.'s effects, and if D. paid contribution-money for more than 150*l.* it shall be returned.

A. becoming a bankrupt, a commission of bankruptcy issued out against him, and *D.* comes in as a creditor, and pays his contribution-money as claiming a debt of 200*l.* and proves the debt.

Then *B.* becomes a bankrupt, and a commission being taken out against him, *D.* in like manner as before, pays his contribution to this commission as for the whole debt of 200*l.* and proves it.

Afterwards *C.* the last indorser becomes a bankrupt, and on a commission taken out against him, *D.* (as before) pays his contribution-money as for the whole debt of 200*l.* and proves the same.

The assignees under the commission of bankruptcy against *A.* the first bankrupt pay a dividend to *D.* after the rate of 5*s.* in the pound out of *A.*'s estate, and then the assignees in the commission of bankruptcy against *B.* propose to make a dividend out of *B.*'s estate, but refuse to pay *D.*'s dividend as a creditor for the whole 200*l.* but only for the 150*l.*, 50*l* of the 200*l.* being paid off by the dividend made out of *A.* the first bankrupt's estate.

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Upon this *D.* petitioned the *Lord Chancellor*, and insisted, that as the commissioners in the commission against *B.* took *D.*'s contribution-money, as of the whole debt of 200*l.* so they ought to allow *D.* a dividend for the same; and especially in regard all the dividends which were like to come to him out of the estates of the three bankrupts, would not be near suffi-

Ex parte LEFEBVRE.

cient to pay his just debt; and that as to *D.* ——— the first drawer and the two indorsors were equally his debtors for the whole; wherefore it was prayed, that *D.* the petitioner should have his dividend out of the estate of *B.* the bankrupt for his full debt of 200*l.* and not as reduced to 150*l.* by his having received the dividend of 5*s.* in the pound out of the estate of *A.*

Lord Chancellor: The 5*s.* in the pound which the petitioner *D.* has received upon the dividend out of the estate of *A.* must be taken to reduce and lessen the debt due to the petitioner upon this note; for as 5*s.* in the pound is paid in part of the debt, by necessary consequence so much less of the debt remains due, and therefore the petitioner must take a dividend as for a debt of 150*l.* only unpaid upon the note; but with regard to so much of the contribution-money as the petitioner *D.* paid to the assignees in the commission of bankruptcy sued out against *B.* the first indorsor beyond the debt of 150*l.* remaining due on the said note, let that be refunded. (1)

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(1) But the rule now is that the creditor shall receive his dividend upon the *whole* debt *proved* under each commission (but not more than 20*s.* in the pound altogether) although he shall not be at liberty to *prove* under any one commission more than what *remains* due *at the time of the proof made.* *Cooper* v. *Pepys*, 1 Atk. 106. *Ex parte Wyldman*, 2 Vez. 113, and 1 Atk. 109. S. C. et vide *Ex parte Ryswicke*, ante, 89.

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CASE 130.

LEG *versus* TURNBULL.

Lord Chancellor KING.

2 Eq. Ca. Ab. 691. pl. 4.

A COPYHOLDER in fee by will charges his lands with payment of his debts; the lands lay in *England*, but the heir of the testator was an infant, and lived in *Scotland.*

A copyholder in fee by will charges his lands with payment of his debts, the lands being in England, the heir an infant in Scotland; the creditors bring their bill to have their debts paid out of the copyhold premises; the heir appears, and there is an attachment for want of an answer; but the heir being an infant, the next step is to bring up the body; the infant being in Scotland the plaintiff is at a stand. The infant must answer by a certain time, or shew cause why a receiver should not be appointed.

A bill had been brought against the heir for satisfaction of the debts out of the copyhold estate, to which the heir appeared, but was in contempt for not answering.

Whereupon Mr. Solicitor General *Talbot* moved, that the plaintiff might have the like process against the defendant the infant as if he were of age, or else that the Court would appoint a receiver of the estate in question; for that as the defendant

LEG *v.* TURNBULL.

the infant enjoyed such estate by the protection of the laws of *England*, so the same ought to be subject to the laws of *England*; and if the Court should not make some order in this case for the relief of the plaintiff, there would be a failure of justice, since the defendant being an infant, the process after an attachment was for a messenger to bring up the body to answer (*z*), which could not be in this case, in regard the defendant the infant was in *Scotland*; but if he were of age, the plaintiff might proceed to a sequestration of the land in question, and by that means have a remedy.

Lord Chancellor: The Court ought to lend its assistance in this case, in order to prevent a failure of justice; and if the defendant will not answer, the lands being in *England*, I will stop the rents in the tenant's hands; but let the defendant answer by the second seal after term, or shew cause why process should not issue against him as if he was of full age, or why a receiver should not be appointed of the premises. (*y*)

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(*z*) *Eyles* v. *Le Gros*, 9 Ves. 12. and see *Perkins* v. *Hamond*, 1 Dick. 287.

(*y*) So, a sequestration was granted against an infant Peer for not appearing. *Anon.* 2 Cha. Ca. 163.

6. Sim. 8.

SIR ROBERT DAVERS *versus* DAVERS.

CASE 131.

Lord Chancellor KING.

2 Str. 764.
2 Eq. Ca. Ab. 285. pl. 3.
An order made at the Rolls, that the defendant might inspect a deed proved in the cause and referred to by the deposition as being part thereof, discharged by Lord Chancellor, for that the defendant before hearing is not to see the strength of the cause, or any deed to pick holes in it.

IN the proofs of this cause the plaintiff had proved a certain deed, and the defendant on petition to the *Master of the Rolls* got an order for leave to inspect the deed, because (as was said by Mr. *Solicitor General*, in support of the order) the deposition of the witness referring to the deed made the same part of the deposition.

Mr. *Lutwyche* moved to discharge this order, for that the other side can have no right to see the strength of my cause, or the evidence of my title before the hearing; and if this were to be granted, such motions would be made every day, since it would be every one's curiosity to try to pick holes in the deed or settlement by which he is disinherited, and no such order in the like case was ever yet made.

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Which *Lord Chancellor* thought very reasonable, and therefore discharged the order (1)

(1) Vide *Hodson* v. *Earl of Warrington*, post. 3 vol. 35. (*x*)

(*x*) *Gardiner* v. *Mason*, 4 Bro. C. C. 479. *Wiley* v. *Pistor*, 7 Ves. 411. *Potts* v. *Adair*, 3 Swan. 268. n.

* CASE 132.

Ex parte MANNING.

Master of the Rolls.

2 Eq. Ca. Ab. 689. pl. 11. A reversion expectant on an estate for life is decreed to be sold, B. is confirmed the best purchaser, and the order made absolute 1 Jan. 1724. On the —— day of Jan. 1726. B. is ordered to bring his money into the bank; the life drops; if the life had dropped the next day after the report of B.'s being the best purchaser made absolute, the purchase must have stood; and as from that time the life was wearing, so from that time the purchaser ought to pay interest.

AN estate, which was the reversion of an house in *Northampton* expectant on a life, was decreed to be sold to the best purchaser; *J. S.* was reported * the best purchaser, and that report absolutely confirmed the 1st of *January* 1724, but the conveyance of the reversion was not executed to the purchaser until 1726, two months before which, the purchaser was ordered to bring his purchase-money into the bank, and about that time the life fell in, so that the purchase proving a beneficial one, it was now petitioned, that the purchaser should pay interest for his purchase-money from the 1st of *January* 1724, which was the time he was absolutely confirmed the best purchaser.

[*411] *Master of the Rolls*: From that time the purchaser was sure of his title and of his purchase, though the tenant for life had died the next day, and from that time the life was wearing, which is equivalent to the taking of the profits, and in case the purchaser had taken the profits, he must certainly have paid interest: also from the time of the report confirmed absolutely, the estate is bound, and the party who was to convey is become but a trustee for the purchaser, who ought to have the money ready.

And as it does not appear that the purchaser from that time kept the money dead by him, so he ought to have no advantage of the use or interest thereof, which seems to belong to the seller, or to those trusts for which the estate was to be sold.

Therefore let the purchaser pay interest from the time of his

being confirmed absolutely the best purchaser to the time of his bringing the money into the bank (1). Ex parte MANNING.

(1) Vide *Davy* v. *Barber*, 2 Atk. 489. *Blount* v. *Blount*, 3 Atk. 636 (*z*).

(*z*) *White* v. *Nutt*, ante, 1 vol. 62. *Growsock* v. *Smith*, 3 Anst. 877. *Ex parte Minor*, 11 Ves. 559. *Mackrell* v. *Hunt*, in note to *Acland* v. *Gaisford*, 2 Madd. 34.

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1920. 1 Ch 530.

TERM. S. TRINITATIS, 1727.

DEG *versus* DEG. CASE 133.

(On an Appeal from a Decree at the Rolls.)

A BILL was brought by the creditors of *Simon Deg* the defendant's father (some of which were bond-creditors and some simple-contract creditors) for the payment of their debts out of a personal estate, and out of a trust-estate created by the will of *Simon Deg* for that purpose. Lord Chancellor KING. 2 Eq. Ca. Ab. 500. pl. 29. 673. pl. 11.

On the marriage of the said *Simon Deg* with *Silena Williams*, Sir *Simon Deg* the grandfather of *Simon Deg* did by deed of settlement in 1695, settle lands in *Derbyshire* and *Staffordshire* to the use of *Simon Deg* for life, remainder to *Silena* his wife for her life, remainder to the first and every other son of that marriage in tail male successively, with divers remainders over, remainder in fee to one *Deg* a relation, with a covenant in the settlement, that 3500*l.* being the wife's fortune, should be laid out in a purchase of lands in fee-simple, in the names of trustees, and settled to the same uses.

In 1722, *Silena* the wife dies, leaving three sons by this marriage, the defendant *Simon Deg*, *William* and *John*. [413]

Simon Deg laid out 3000*l.* part of his wife's portion of 3500*l.* in the purchase of lands, and buys them in his own name.

Afterwards *Simon Deg* marries the plaintiff *Jane* his second

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wife, with whom he has 2000*l.* portion, and covenants to add 2000*l.* to her 2000*l.* and to raise a further sum of 4000*l.* by 200*l.* per annum, and to lay the same all out in lands, to be settled to the use of himself and his wife *Jane* for their lives, with remainder to their children.

But during his first marriage, by indentures of lease and release dated the 1st and 2d of *Feb.* 1705, reciting the covenant for laying out the 3500*l.* in the purchase of lands and settling them in the same manner as the said lands were settled upon *Silena*'s marriage, and reciting further, that this 3500*l.* had been all received by *Simon Deg* the defendant's father, and also that lands in *Derby*, together with lands in *Mapleton*, had been purchased with part of this trust-money, and that there was a defect in the said settlement made upon the said *Silena*'s marriage, in that there was no provision made for younger sons of that marriage; therefore *Simon Deg*, for supplying that defect, and in pursuance of the trust, conveyed the lands in *Derbyshire* and *Mapleton* to trustees, to the use of *Simon Deg* the defendant's father for life, remainder to the said trustees for 1000 years, in trust for raising such sums for the benefit of the two younger sons by *Silena* (not exceeding in the whole 4000*l.*) as the said *Simon Deg* the defendant's father
[414] should appoint, remainder to the first, &c. son of the said *Simon Deg* by the said *Silena* in tail male, remainder to the first, &c. son of the said *Simon Deg* by any wife in tail male, remainder over to the same uses as were limited in the deed of settlement made upon the said *Silena*'s marriage, with a power of revocation reserved to the said *Simon Deg* (the defendant's father) by any instrument in writing attested by two or more credible witnesses.

17 *June* 1715, *Simon Deg* makes his will attested by three witnesses, and therein by express words devises his lands in *Staffordshire* and all his lands in *Derby* and elsewhere in the county of *Derby*, and the equity of redemption thereof, and all his personal estate to trustees (viz.) Lord *Macclesfield* and ——— *Poole*, Esq., and to their heirs, executors and administrators, in trust that they should sell all these devised premises, and thereby, together with his personal estate, pay all his debts, and the surplus to be applied as by will, leaving the trustees executors.

Soon after the testator *Simon Deg* dies, leaving three sons by his second wife, being indebted 8000*l.* and upwards by marriage articles (which is a debt by (*a*) specialty) and 570*l.* by simple contract, and 2331*l.* for rents and profits received by

(*a*) Vol. 1. 130. Benson versus Benson.

Simon Deg after his first wife's death, from an estate that upon the death of his said first wife did belong to the defendant *Simon Deg* his eldest son.

And upon this case the several following points arose, and were determined.

1*st*, That though money had no (*a*) ear-mark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor * should realize all his testator's assets, and afterwards die insolvent, yet a court of equity cannot charge (1) or follow the land: nevertheless in the present case, where the defendant's father *Simon Deg* by his deed had owned the receipt of the money, and that he had laid out the same in the purchase of lands in *Derby* and *Mapleton*, this was resolved to amount to a declaration of trust, and to raise a specific lien upon those estates (2).

(*a*) See Preced. in Chan. 84. Kirk v. Webb, and 168. Halcott v. Markant. Money has no ear-mark, and if invested in land or other things it cannot be pursued; therefore if a receiver of rents, or if an executor in trust lays out the rents or the assets in a purchase of lands in fee, and dies insolvent, the purchase will not be liable; but where A. receives a sum of money, which he covenants to lay out in land to be settled to certain uses, and afterwards purchases an estate which he does not settle, but does by writing own that this purchase was made with the trust money, this binds the estate, and is a declaration of trust.

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And though it was made a question at the former hearing, whether the will of *Simon Deg* the father devising all his lands in *Derby* and elsewhere in the county of *Derby* to trustees for the payment of his debts, (the testator having no other lands there than the lands in question) did not amount to a revocation of the settlement in 1705, since the will devised the same lands to different uses, and the circumstances required by the power were observed, though the power itself was (3) not mentioned; which question was referred to the Judges of the Com-

If one has made himself tenant for life of lands in Dale, with a power by any writing, &c. to revoke these uses, and limit new ones, and he afterwards by will devises all his lands in Dale, &c. to J. S. having no other lands in Dale excepting these, they shall pass, if the will be circumstanced as the power requires, though no mention be made of the power.

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(1) But the Court thought otherwise in the cases of *Balgney* v. *Hamilton*, Amb. 414. *Ryal* v. *Ryal*, Amb. 413. *Lane* v. *Dighton*, Amb. 409 (*z*).

(2) Where a man covenants to lay out money in the purchase of land to be settled, and afterwards purchases land, but does not settle it, yet he shall be presumed to have purchased with intention to perform his covenant, and the land purchased shall be bound to the uses of the settlement. *Lechmere* v. *Lord Carlisle*, post. 3 vol. 228, and the cases there cited.

(3) Vide *Tomlinson* v. *Dighton*, ante 1 vol. 149.

(*z*) See *Sowden* v. *Sowden*, 1 Bro. C. C. 582. 1 Cox, 165. *Perry* v. *Phelips*, 4 Ves. 108. *Lench* v. *Lench*, 10 Ves. 511. *Lewis* v. *Madocks*, 8 Ves. 150, 17 Ves. 48. *Savage* v. *Carroll*, 1 Ba. & Be. 265. *Taylor* v. *Plumer*, 3 M. & S. 562. *Liebman* v. *Harcourt*, 2 Mer. 513.

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mon Pleas, who determined that the will operated as a revocation; yet it was now held, that the will only operated as a devise of the legal estate, still subject to the trusts before declared for the benefit of the defendant *Simon Deg* the eldest son; and that the trusts being once declared, he (the father) could not annex a power of revocation to it, or limit a term thereout for the benefit of his younger sons by his said first wife.

1 Mk. 501. [416]

If a devise be to executors of an equity of redemption only, this is but equitable assets, and to be applied to pay all sorts of creditors equally.

2*dly*, It had been objected, with regard to the lands not affected by settlement, that the devise being to the executors and their heirs, to be sold for payment of debts, these lands (according to the cases in 1 *Leo.* 224. *Alexander* versus *Lady Gresham*, 1 *Lev.* 224. *Dethick* versus *Carravan*, 1 *Ro. Abr.* 920. *plac.* 6. and *Hard. Rep.* 405, *Berwell and Salter* versus *Corrant*) were legal assets, and consequently the debts must be paid in a course of administration; otherwise, if the devise were to trustees who were not executors, or to executors and also to (1) a third person a stranger, in either of which cases they would be only equitable assets; but in the present case the devised premises being legal assets, must be administered according to law, and consequently specialty debts were to have the preference in payment; to which at the first hearing the *Master of the Rolls* seemed not to agree, in regard generally all devises for payment of debts are to executors: and see 2 *Vern.* 133. *accord'*. (2).

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(1) Vide *Lord Masham* v. *Harding*, Bunb. 339.

(2) Upon the principle of *law*, that whatever came to the hands of a person in the character of executor or by reason of his executorship, should be *assets* in his hands (according to the cases in Lev. Hard. &c. cited above) the generality of the old cases determined that *money* arising by sale of lands devised to, or subjected to the power of, executors, to sell for payment of debts and legacies, should be *legal* assets in their hands (although they could not be charged with the value of the lands before sale). *Girling* v. *Lee*, 1 Vern. 63. *Hawker* v. *Buckland*, 2 Vern. 106. *Greaves* v. *Powell*, 2 Vern. 248. *Cutterback* v. *Smith*, Pre. Cha. 127. *Anon.* 2 Vern. 405. *Bickham* v. *Freeman*, Pre. Cha. 136. *Walker* v. *Meager*, post. 552. *Lord Masham* v. *Harding*, Bunb. 339. *Blatch* v. *Wilder*, 1 Atk. 420. Yet *some* of the old cases, considering the devisee, &c. in the double character of trustee and executor, preferred the *former*, and consequently made the assets *equitable*, *Hickson* v. *Witham*, Finch, 196. *Anon.* 2 Vern. 133. and the later cases incline strongly to this construction, *Chambers* v. *Harvest*, Mos. 123. *Hall* v. *Kendal*, Mos. 328. *Prowse* v. *Abingdon*, 1 Atk. 484. *Lewin* v. *Okeley*, 2 Atk. 50. *Silk* v. *Prime*, 1 Bro. C. C. 138. note. *Barker* v. *Boucher*, 1 Bro. C. C. 140. note. *Newton* v. *Bennet*, 1 Bro. C. C. 135. *Batson* v. *Lindegren*, 2 Bro. C. C. 94. Still however it seems that where an estate *descends* to the heir charged with payment of debts, it will be *legal* assets, *Freemoult* v. *Dedire*, ante, 1 vol. 430. *Plunkett* v. *Penson*, 2 Atk. 290 (*z*).

(*z*) So *Young* v. *Dennet*, 2 Dick. 452. But contra, *Hargrave* v. *Tindal*,

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However, it was now resolved that the premises devised being mortgaged in fee by the testator, and he having nothing but an (1) equity of redemption, could be only equitable assets, and consequently must go among all the creditors equally; forasmuch as a debt by judgment and a debt by simple contract are in conscience equal.

A. devises all his real and personal estate to his executors and their heirs, in trust to sell and pay all his debts, his real estate being only equitable assets, and the testator leaving debts by bond and simple contract: if the bond creditors are paid part out of the personal estate, they shall bring it back again into hotchpot, if they would be paid any thing out of the real estate.

3dly, The next point (and what was principally appealed from in his Honour's decree) was, that he had (*a*) decreed, that though the specialty creditors were at liberty to take their preference out of the personal estate, yet in case these should come in upon the lands devised in trust to pay all the debts, they should first * bring into hotchpot what they had received out of the personal estate.

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Against which it was objected, that the specialty creditors, as to the personal estate of the testator, were to have the preference and to be first paid; and for the residue of their debts remaining unpaid, they ought to come in with the simple-contract creditors upon the (*b*) trust-estate; that the testator had no power over the personal estate, so as to exempt the same from his debts, or from payment in a course of administration; and therefore, if the devise were of the personal estate to be equally divided betwixt his specialty creditors, and simple-contract creditors, this would be void, and the specialty creditors would have all; so that the devise of the personal estate being void, it was as if it were entirely omitted out of the will, or the devise was only of the real estate for the payment of debts; and for the payment of debts must signify the payment of all debts, which would take in those by specialty as well as by simple contract; besides, in this case the fact happened to

(*a*) Upon the special matter of the Master's Report, 16 *April* 1724.
(*b*) Vide the case in vol. 1, 228. of *Carr* versus *Countess of Burlington*.

(1) Vide the case of Sir *Charles Cox*'s creditors, post. 3 vol. 341. But from the manner in which the case of *Deg* v. *Deg* is mentioned by the Master of the Rolls himself, in *Chambers* v. *Harvest*, Mos. 123. and *Hall* v. *Kendall*, Mos. 328. it seems not to have been decided on the ground of the premises devised being an equity of redemption, but upon the principle mentioned in note 2. sup.

1 Bro. C. C. 136. n. *Bailey* v. *Ekins*, 7 Ves. 319. *Shiphard* v. *Lutwidge*, 8 Ves. 26. *Clay* v. *Willis*, 1 B. & C. 364.

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be, that if the specialty creditors were to bring into hotchpot what they received out of the personal estate, they then would receive little or nothing out of the real estate; and consequently the devise, as to them, for payment of their debts with the other creditors out of the real estate, would be vain.

However, this part of the decree was affirmed by the *Lord Chancellor*, in regard the testator had connected together his
[418] real and personal estate with a view that all should go equally to pay his debts, and he might give his equitable assets in what manner and upon what terms he pleased: for instance, he might dispose of them in trust to pay his simple contract debts only (*z*), though it was true he had no power by his will to dispose of his personal estate from his creditors, or to devise it for satisfaction of his simple contract creditors, in preference to his specialty creditors; but these equitable assets being entirely within his power, he might let in the specialty creditors for a satisfaction thereout, under what terms he should think proper; and it was a very ill argument to say, that the specialty creditors had received so much out of the personal estate, as to make it not worth their while to bring it into hotchpot; for the more they had received of the personal estate, the less need they had of the aid of a court of equity to be paid out of the trust estate (1).

The testator's heir at law who opposed the will as to part of the lands devised thereby to pay debts, yet being a creditor was let into the residue of the fund raised by the will for the payment of debts.

In the last place it was objected, that the defendant *Simon Deg* the heir ought not to be let into this fund of the equitable assets devised for the payment of debts, since the *Derby* estate was part of the land devised to pay the debts, and the eldest son opposed this estate's being made liable to them, in which he opposed his father's will, and hindered as much as he could its taking effect; and in case the defendant the eldest son would take any advantage of the will, he ought to abide by the whole will.

But to this it was answered and resolved, that as to the *Derby* and *Mapleton* lands, taking it that the defendant the eldest son had a specific lien thereupon, then they were the de-

(1) And *Bailey* v. *Ploughman*, Mos. 95. was decided in the same manner upon the authority of *Deg* v. *Deg*. So, *Haslewood* v. *Pope*, post. 3 vol. 323. *Morice* v. *Bank of England*, Ca. temp. Tal. 220.

(*z*) Contra, *Vernon* v. *Vaudry*, Barnard. 304. and see *Millar* v. *Horton*, Coop. 45.

fendant *Simon Deg* the son's own lands, and it was not to be supposed, that a court of equity would compel any person to admit a testator's devise of lands, which were not the testator's own, but the lands of the creditor, who would come in upon the fund given by the testator for the payment of debts; so that as to the lands in *Derby*, the testator the father's devise was as much void, as if the father had devised any other part of the estate of the said defendant *Simon Deg* the son (1).

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(1) But if the son had been a volunteer only (and not a creditor) he should have been put to his election, *Noys* v. *Mordaunt*, 2 Vern. 581. *Streatfield* v. *Streatfield*, Ca. temp. Tal. 176 (*z*).

(*z*) It is a general rule that a person cannot accept and reject the same instrument; *Birmingham* v. *Kirwan*, 2 Sch. & L. 449.—*Kidney* v. *Coussmaker*, 12 Ves. 154, agrees with the principal case that this doctrine is not applicable to creditors; but see *Clarke* v. *E. of Ormonde*, Jacob, 115. See farther on the subject of election, *Forrester* v. *Cotton*, Amb. 388, 1 Eden, 532. *Whistler* v. *Webster*, 2 Ves. jun. 371. *Lady Cavan* v. *Pulteney*, ib. 544. *Wilson* v. *Lord J. Townshend*, ib. 693. *Wilson* v. *Mount*, 3 Ves. 191. *Rutter* v. *M'Lean*, 4 Ves. 531. *Wollen* v. *Tanner*, 5 Ves. 218. *Blount* v. *Bestland*, 5 Ves. 515. *Broome* v. *Monck*, 10 Ves. 616. *Moore* v. *Butler*, 2 Sch. & L. 249. *Judd* v. *Pratt*, 13 Ves. 168. 15 Ves. 390. *Thellusson* v. *Woodford*, 13 Ves. 209, 1 Dow, 249. *Dashwood* v. *Peyton*, 18 Ves. 27. *Dillon* v. *Parker*, 1 Swan. 359. *Gretton* v. *Haward*, ib. 409. *Hume* v. *Rundell*, 2 S. & S. 178.

3. Ves. Hen. 692.

NICHOLLS *versus* OSBORN.

CASE 134.

ONE Mrs. *Powel* by will, after several legacies, devised her household goods to *J. S.* and the surplus of her personal estate, which was about 3000*l.* to her niece (being an infant of about seventeen) to be paid to her at her age of twenty-one years, and if she should die before twenty-one or marriage, then the testatrix devised it over, and she also devised a small estate in lands to the said niece in possession.

At the Rolls. 2 Eq. Ca. Ab. 209. pl. 4. 566. pl. 14. A. having a niece an infant about the age of 17, devised to her the surplus of the personal estate payable at 21; the niece shall have the interest paid her in the mean time, though the surplus be devised over, if the niece die before twenty-one or marriage, the devise over being but a condition subsequent.

On the death of the testatrix, the questions were, 1*st*, who should have the produce and interest of this surplus during the infancy of the niece?

2*dly*, Whether by the devise of the household goods the plate should pass?

NICHOLLS *v.* OSBORN.

Object. This produce, &c. ought to be laid up until the niece should come to twenty-one or be married, and be then paid to the niece, but if she should die before, in such case it ought to be paid to the devisee over, and that nothing was to be paid before the niece should come to twenty-one or be married, because it was not due till then.

[420] For the niece it was argued, that the surplus being devised to the niece payable at twenty-one or marriage, this was *debitum in præsenti*, though *solvendum in futuro*, and the devise over, in case she should die before twenty-one or marriage, being in nature of a condition subsequent, could not defeat the first devisee of the mesne profits accruing before the devise over took effect; as if I should devise lands to an infant, to be void if the infant should die before twenty-one, though the infant should die before twenty-one, yet would he be entitled to the mesne profits until the time of his decease. So if I was to devise to one 1000*l.* and if he dies before twenty-one, then the same to go over, the devisee the infant should have (1) the interest till his death; neither was there any diversity betwixt (2) a devise of a particular sum, and the devise of a surplus, for this last may by computation be reduced to a certainty. Also when the devise is of a surplus to an infant, and if he dies before twenty-one, then to go over, the surplus devised over is the same surplus which was devised to the infant; whereas it would be a different and greater surplus, were it to carry the interest accruing during the life of the infant, added to what was the surplus at the time of the testator's death, which seems not to have been intended.

Master of the Rolls: Let the Master take the account, but reserve the point, whether the infant shall be entitled to the interest of the surplus during her infancy, and let it be spoke to in Court, it not being fit to be determined on a private hearing by consent.

[*421] Plate in common use passes by the devise of household goods, notwithstanding any parol proof that it was not intended to pass (3).

Afterwards in *Trin. Vac.* 1728, this cause came on upon the Master's report, whereby though there were reported manifest * intentions and declarations of the testatrix as to the other point, that she did not intend the plate should pass, yet the Master certifying that the plate was commonly used in the house:

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(1) So, *Taylor* v. *Johnson*, post. 504.

(2) That is, as between the first taker and the devisee over.

(3) So, *Lillcot* v. *Compton*, 2 Vern. 638. *Masters* v. *Masters*, ante, 1 vol. 425. *Snelson* v. *Corbet*, 3 Atk. 370. contra *Jesson* v. *Essington*, Pre. Cha. 207.

His Honour rejected all the evidence touching the intention of the party, there being a complete and plain will in writing, which must not be altered or influenced by parol proof (1).

But as to the mean profits of the estate, the Court took it clearly, that the infant niece was entitled to the profits and the interest of the surplus which should incur from the death of the testatrix, and in the life-time of the niece, though she should happen to die before attaining her age of twenty-one, &c. and decreed accordingly (2).

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(1) On a petition preferred to the Master of the Rolls to rectify the minutes in this cause, alleging that, as the Register had taken them, *the testatrix's plate* generally was directed to be delivered to *J. S.* the legatee, whereas it appeared that some part of the plate which the testatrix was possessed of at her death was only pawned to her, and that doubts had arisen whether such part would pass under the general direction, his Honour declared that such part of the said plate as well what was the testatrix's own, as what was pawned to her, which was in common use, passed by the bequest to *J. S.* Reg. Lib. B. 1728, fol. 195.

(2) Vide Reg. Lib. B. 1726, fol. 467. and 1731, fol. 127. And so *Tissen* v. *Tissen*, ante, 1 vol. 500. *Green* v. *Ekins*, 2 Atk. 473. *Chaworth* v. *Hooper*, 1 Bro. C. C. 82. *Hawkins* v. *Combe*, 1 Bro. C. C. 335. (*z*) The same thing was determined in *Shepherd* v. *Ingram*, Amb. 448, where a residue was bequeathed without mention of any time of payment (*y*).

(*z*) *Shawe* v. *Cunliffe*, 4 Bro. C. C. 144.

(*y*) A bequest of a residue payable at a future day carries interest from the death of the testator, contrary to the general rule that a legacy so payable shall not carry interest before the time fixed for payment; (as to which see the notes to *Harvey* v. *Harvey*, ante, 22;) *Crickett* v. *Dolby*, 3 Ves. 10. *Tyrrell* v. *Tyrrell*, 4 Ves. 1. *Sisson* v. *Shaw*, 9 Ves. 285; because the operation of the rule in this case would lead to a partial intestacy, (namely, as to the interest) which the Court endeavours to avoid. *Wadley* v. *North*, 3 Ves. 364. *Booth* v. *Booth*, 4 Ves. 399. *Bolger* v. *Mackell*, 5 Ves. 509. *Leake* v. *Robinson*, 2 Mer. 386. *Skey* v. *Barnes*, 3 Mer. 345. *Bird* v. *Hunsdon*, 2 Swan. 345. So the legatee for life of a residue is entitled to the interest immediately from the testator's death; *Angerstein* v. *Martin*, *Hewett* v. *Morris*, 1 Turner, 232, 241, over-ruling *Stott* v. *Hollingworth*, 3 Madd. 161, and *Taylor* v. *Hibbert*, 1 Jac. & W. 308. But where a bequest of a residue of personal estate is contingent, the interest until the happening of the contingency will accumulate; *Studholme* v. *Hodgson*, post. 3 vol. 305. *Butler* v. *Freeman*, 3 Atk. 58. *Trevannion* v. *Vivian*, 2 Vez. 430. *Bullock* v. *Stones*, 2 Vez. 521. *Montgomerie* v. *Woodley*, 5 Ves. 522. *Glanvill* v. *Glanvill*, 2 Mer. 38; unless in cases where the legatee, as being the infant child, &c. of the testator, is entitled to the interest in the shape of maintenance, for which see note to *Harvey* v. *Harvey*, ub. sup.

CASE 135.

MADDOX *versus* STAINES.

Lord Chancellor KING. 2 Eq. Ca. Ab. 341. pl. 15. Devise of a personal estate to A. for life, and afterwards for her children, the yearly interest and produce to be for their maintenance, until the sons should be twenty-one, and the daughters eighteen, at which respective ages their respective portions to be paid them, and for want of such issue then to B. A. dies without issue; the devise over to B. good, the words [for want of such issue] being the same as [for want of such children.]

THOMAS *Lord*, possessed of a considerable personal estate, did by his will in 1720, after some legacies, devise the residue of his personal estate to his niece *Alice Staines*, wife of *John Staines*, for her separate use, and after her death, the yearly interest and produce thereof to be for the maintenance and education of such children as she should have by the said *John Staines*, until the ages following, (viz.) until the sons should come to twenty-one, and the daughters to eighteen, who at such their respective ages were to be paid their portions; and for want of such issue, then all the said estate to go to the children of *Sarah Maddox*.

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2. Rus. Ch. 427.

Alice Staines died without issue, and the children of *Sarah Maddox* brought their bill against the executors of *Staines* for an account of this personal estate.

And now Dr. *Henchman* and Dr. *Pinfold*, together with the *Attorney* and *Solicitor General*, argued that the devise over of this personal estate was after too remote a possibility, it being devised over *for want of issue* of *Alice Staines*, and particularly Mr. *Solicitor General* insisted, that if the words [for want of such issue] should be intended to signify such child or children of *Alice Staines* as should attain the age of twenty-one if sons, or eighteen if daughters, yet this would exceed the rule which confines these bequests (especially of mere personal estates) to lives in being, for this might be above twenty years after the life of *Alice Staines*, in regard she might die and leave an infant son just born, which would be carrying executory devises further than had yet been done; for which were cited 1 *Sid.* 37. *Witmore* and *Weld.* 1 *Vern.* 326. and *Pollexfen* 57.

Lord Chancellor: A devise over of a lease for years or other personal estate after a death without issue, or in failure of issue, would have been void; but here the devise being to *Alice Staines* for her life, and then the interest and produce thereof for the maintenance and education of her children, the sons till twenty-one and the daughters till eighteen, and at those ages the principal to be paid to them in equal shares and proportions, therefore *for want of such issue*, must be intended, *for want of such children*, and whether *Alice Staines* shall leave children will be known at her death; if she does leave children, then

those children are to have the proceed and produce of the estate for their maintenance, until they come to age, before which time if they had the absolute interest therein, they could not by reason of their infancy dispose of it; but as soon as they do come to that age, then they are to have the entire property, and therefore this is a very good executory devise (1).

See the case of *Masinburgh* versus *Ash*, 1 *Vern.* 234. 257. 304. and vol. 2. of the *Chancery Rep.* 8vo. 275. where the like executory devise of a term for years was decreed to be good by Lord Keeper *North*, by the advice of all the Judges of *C. B.* who certified the same under their hands the 17th of *February* 1684. *Jones* Chief Justice, *Levinz*, *Charlton* and *Street*, Justices (*z*).

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(1) Reg. Lib. B. 1726. fol. 348. which decree was affirmed on appeal to Lord Chan. *King*, Reg. Lib. B. 1727, fol. 47. and again on an appeal to the House of Lords. 3 Bro. P. C. 383.

(*z*) See *Atkinson* v. *Hutchinson*, 3 vol. 258.

TERM. S. MICHAELIS, 1727.

COUNTESS OF GAINSBOROUGH *versus* GIFFORD.

CASE 136.

At the Rolls.

2 Eq. Ca. Ab. 162. pl. 15. See Preced. in Chan. 221.

THE plaintiff brought her bill to be relieved against a contract which her broker had made for the purchase of twelve shares in the stock of the *Welsh* copper company from the defendant for 54*l.* per share, to be transferred by the defendant to the plaintiff at the then next opening of the books; the contract was made on the 12th of *August* 1720, and the next opening was on the 22d of the same month.

The defendant brought his action on the contract, and recovered a verdict for the whole money, deducting only for what the shares sold at.

The Countess first brought her writ of error, and then her

Countess of GAINSBOROUGH v. GIFFORD.

bill in this Court; and the injunction being dissolved by the *Lord Chancellor*, the Countess paid the money recovered at law and the costs. The bill insisted that the defendant had not so many shares, nor had registered the contract.

[425] But the defendant, in order to recover the costs in this Court, set down the cause *ad requisitionem defendentis.*

It was argued for the plaintiff, that the defendant by his answer had confessed he had sold her shares on the 22d of *August* at 34*l.* per share, and that this being the produce of the plaintiff the Countess's shares, which she had bought, the money belonged to her.

Upon which the defendant's counsel insisted, that this was a mistake in the plaintiff's office copy, the original of the defendant's answer being otherwise, which was then also produced, and signed by the counsel's (Mr. *Hungerford*) own hand, wherein it was not said *her* shares, but it was said *ten* shares.

His Honour immediately ordered, that the answer itself should be sent for from off the file, and in the mean time it was urged for the defendant, that even this was what ought to have been insisted upon by the defendant at law (the now plaintiff) at the trial, in mitigation of damages, and that a court of equity ought not to give relief to a defendant at law who might, but neglected to make a proper defence.

Soon afterwards the record itself of the answer being taken off the file, was brought into Court, and the word in question appeared to be [her] as in the office copy, and not [ten] as in the original draft of the answer.

Master of the Rolls: I do agree the Court ought to be very tender how they help any defendant after a trial at law, in a matter where such defendant had an opportunity to defend himself.

2 Mutk. 424 In some cases equity relieves after a verdict at law, and where the plaintiff in equity might properly have defended himself, as where a receipt from the plaintiff at law is found after the verdict.

* But still such cases there are, in which equity will relieve after a verdict, in a matter where the defendant at law might properly have defended himself (*z*).

[*426] As if the plaintiff at law recovers a debt against the defendant, and the defendant afterwards finds a receipt under the plaintiff's own hand for the very money in question. Here the plaintiff recovered a verdict against conscience, and though the receipt

(*z*) See *Stevens* v. *Praed*, 2 Ves. jun. 201. *Ware* v. *Horwood*, 14 Ves. 31. 519. *Bateman* v. *Willoe*, 1 Sch. & L. *Protheroe* v. *Forman*, 2 Swan. 227.

Countess of GAINSBOROUGH *v.* GIFFORD.

were in the defendant's own custody, yet he not being then apprized of it, seems entitled to the aid of equity, it being against conscience, that the plaintiff should be twice paid the same debt; so if the plaintiff's own book appeared to be crossed, and the money paid before the action brought.

Now the principal case is within the same reason; if the defendant in this Court, who was plaintiff at law, has been paid great part of his money by the sale of those shares, which he had contracted to sell to the plaintiff, the money raised by this sale ought to be applied towards the discharge of the debt which the plaintiff the Countess owed him; and though it were impossible for any other person to know one share from another, yet the plaintiff at law, who is the defendant in this Court, might himself know that these shares which he sold on the 22d of *Aug.* 1720, were the very shares he contracted to sell to the plaintiff the Countess; and the Court must take this confession of the defendant in his answer to be an ingenuous confession of the truth; more especially, as the price of 34*l.* per share was much more than the intrinsic value of the stock, and it appears that the rate which the stock bore at the time the verdict was given, though then very low, was yet not fully allowed to the [427] plaintiff the Countess; nor would his Honour hear of any proof that the record of the answer was mistaken in being made contrary to the original draft.

But as the defendant in his action at law had recovered his money against conscience, the Court decreed him to pay back to the plaintiff the money for which he had sold the shares, confessed by the answer to be her shares, deducting what had been allowed at the trial to the Countess for the then value of the said twelve shares.

An answer amended after hearing, and decree, on affidavit of the solicitor and his clerk, that the mistake was in the ingrossing the answer from the draft and the draft produced.

But afterwards, upon very full affidavits by the Solicitor and his clerk, that this was only a mistake in the person that ingrossed the answer, and the foul draft being produced, upon solemn debate before *Lord Chancellor*, assisted by the *Master of the Rolls*, the Court gave the defendant leave to amend the answer, and to swear it over again, though no precedent could be shewn that this was ever done after the cause heard, and this matter had been before denied on a petition, and on a motion (1) (*z*).

(1) The order after stating the several facts relative to the mistake, and the substance of the affidavits, and that the said defendant had applied to have the

(*z*) The present course is to give leave, not to amend, but to file a supplemental answer, upon a proper case being made out. *Jennings* v. *Merton*

CASE 137. SMALL *versus* OUDLEY & al'.

At the Rolls. 2 Eq. Ca. Ab. 122. pl. 2. A goldsmith after shutting up his shop, being greatly indebted, assigns his stock in the wine-trade in which he was concerned to J. S. being a particular creditor, and to secure his debt, but without the knowledge of J. S. and becomes a bankrupt the very next day. J. S. brings a bill to have the benefit of this assignment; and decreed for him.

ONE *Norcourt* had long followed the business of a goldsmith, and on *Michaelmas* day last, after he had shut up shop, being indebted to several persons much beyond what he was able to pay, in contemplation of his bankruptcy, and to give a preference in payment to the plaintiff *Small*, who in friendship * had then lately advanced a considerable sum of money, did, in order to secure to the plaintiff *Small* the money due to him from the said *Norcourt*, make an assignment to him of two leases, and also of two thirds of his stock in the wine trade, which he was concerned in with the defendant *Oudley*, being about the value of 300*l.* and this assignment was made without the privity of the plaintiff *Small*; *Norcourt* never opened his shop again, but the very next day after making this assignment went off, and was afterwards found a bankrupt, and to have become such the day after *Michaelmas* day, and

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said cause reheard, proceeds thus: "and "the said cause coming on to be re- "heard, his Lordship gave the said de- "fendant time to find out precedents, "whereby leave had been given at or "after the hearing of a cause to a de- "fendant to amend his answer in the "*material* part thereof; and the said "defendant on the 1st of *June* instant "*laying several precedents* before the "Court, his Lordship directed the de- "fendant to attend him and the Master "of the Rolls therewith, and gave him "leave to move to amend his answer in "the particulars aforesaid on this day, "and the said defendant now moved "the same accordingly, whereupon and "upon *hearing the several precedents* "read, the Court declared, that the in- "serting the word "her" instead of "the word "ten" in the said defend- "ant's answer was a mistake of the "clerk who ingrossed the same, and "doth therefore order that the defend- "ant be at liberty to take the said an- "swer off the file, and to amend the "same by changing the word "her" "to the word "ten," and to new swear "his answer." Reg. Lib. A. 1727. fol. 313.

College, 8 Ves. 79. *Dolder* v. *Bank of England*, 10 Ves. 284. *Wells* v. *Wood*, 10 Ves. 401. *Strange* v. *Collins*, 2 V. & B. 163. *Edwards* v. *M'Leay*, ib. 256. *Curling* v. *Marquis Townshend*, 19 Ves. 631. *French* v. *Myles*, 4 Madd. 404. So in the Exchequer, *Tennant* v. *Wilsmore*, 2 Anst. 362. *Harris* v. *Daubeny*, 3 Anst. 717. *Ridley* v. *Obee*, Wight. 32. S. C. nom. *Taylor* v. *Obee*, 3 Price, 83. But where an answer, by mistake or otherwise, refers in its title to the bill by a wrong description, it is no answer, and the Court will permit it to be taken off the file, amended, and resworn. *Griffiths* v. *Wood*, 11 Ves. 62. *Peacock* v. *D. of Bedford*, 1 V. & B. 186. But see *White* v. *Godbold*, 1 Madd. 269. The title to depositions was amended, and witnesses resworn, *Curre* v. *Bowyer*, 3 Swan. 357. and see *Perry* v. *Silvester*, Jacob, 83.

all his estate was assigned by the commissioners to the defendant *Man*.

The plaintiff *Small*, who was the assignee of these two leases, and likewise of the two thirds of the stock in the wine trade, brought his bill against *Man* the assignee in the commission, and against *Oudley* the partner in the wine trade, to make them account.

Objected for the defendants: This assignment made by the trader, when it was resolved by him that he would be a bankrupt the very next day, and in contemplation of such bankruptcy, and to give a preference to this creditor before others, by which the equal distribution of his effects intended by the statutes is prevented, must be a void assignment.

Besides it is an assignment in general of all his stock in the wine trade, which is the same, as if it had been of all his stock in trade; then this assignment being made without the privity of *Small* the assignee, is therefore fraudulent, there being no account stated on the trade for wine to the bankrupt, nor from the assignee *Small* to the bankrupt, after all which *Small* the assignee comes to have this established, and through partiality assisted in a court of equity, which if allowed, will effectually set aside such parts of several statutes as give an equal distribution of the bankrupt's estates to all his creditors.

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Master of the Rolls: This is a case of great consequence, as it affects trade in general, and as it tends to frustrate the several statutes made for the equal distribution of the effects of bankrupts; but still I think that the assignment by *Norcourt* to *Small* the plaintiff is good, and the plaintiff is entitled to an account of this wine trade against the defendant *Oudley*.

1*st*, As to the matter of bankruptcy, that is a term not known to our common law, but introduced by several statutes; the 3 *H.* 8. *cap.* 4. which is the first, is very imperfect, the next of the 13 *Eliz. cap.* 11. is more large, and that statute since enlarged by several subsequent ones.

Now these statutes do ascertain what acts make a bankruptcy, and there can be no such thing as an equitable bankruptcy, it must be a legal one.

No such thing as an equitable bankruptcy, but must be a legal one.

2*dly*, There may be just reason for a sinking trader to give a preference to one creditor before another, to one that has been a faithful friend, and for a just debt lent him in extremity, when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been gainers; whereas the other may be not only a just debt, but all that such creditor

There may be reason for a bankrupt to prefer one creditor before another.

SMALL v. OUDLEY.

has in the world to subsist upon; in this case (I say) and so circumstanced, the trader honestly may, nay ought to give the preference.

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Not the time when the assignment made material, so as it be before the bankruptcy, but the justice of the debt.

And, 3*dly*, In such case it is not the time when the assignment was made by the trader that is material, provided it be made before the bankruptcy, but the justness of the debt is very material.

No objection that the asignment was made by the trader without notice to the party, for this shews it was without the creditor's importunity.

4*thly*, What has been objected, that *Small* the assignee did not know of this assignment, seems rather an advantage to the assignment, for this shews there was no fraud, no importunity used by the assignee, and oftentimes, upon the account of mere importunity, a trader has, when in trouble, been prevailed upon to make such assignment.

When the thing assigned to the single creditor by the bankrupt is a "chose in action," it is no objection to such assignee that he comes into equity; for he can go no where else.

5*thly*, As to the creditor the assignee's coming into equity, I admit, that every person who comes into equity ought to come with an innocent and a just cause, and the now plaintiff (for ought appears) does so; however, what distinguishes the present case in his favour is, that the assignment being of a *chose in action*, he could, in the nature of the thing, apply no where else for relief, or to have the benefit of the assignment, but in equity. *Secus* if it had been a conveyance of any legal estate.

Precedents where a bankrupt just before his bankruptcy assigned part of his estate to some particular creditors to give them a preference, and held good.

As to the precedents, the same was done in the case of *Cock* and (1) *Goodfellow*, where the assignment was made by Mrs. *Cock* in contemplation of her bankruptcy, and in trust for her own children, and as to part, it was but a direction to her trustees to assign her stock in the bank, &c., and Lord *Macclesfield* declared that this was so far from being an act of fraud in Mrs. *Cock*, though it was for her own children, that it seemed to be just and commendable. So in the case of *Jacob* and (2) *Shepherd*: where *Shepherd* the trader was just on the brink of bankruptcy, and the deed brought ready ingrossed to him, which he executed a little before his bankruptcy, and in contemplation thereof, to give a preference to some of his creditors; indeed I doubted of this; but on the appeal Lord *Macclesfield* ordered a trial, to be informed when the trader became a bankrupt, and the execution of the deed being found to have been before the bankruptcy, the decree was in favour of the deed.

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(1) 10 Mod. 489.

(2) See this case stated at length by Lord *Mansfield*, 1 Bur. 480.

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The like happened in Sir *Stephen Evans*'s case, who having executed a deed immediately before his bankruptcy, and with a view to give a preference to some of his creditors, the same prevailed.

So that this having been settled, though it may have a mischievous consequence in preferring some creditors in hopes of favour from them afterwards, yet according to these precedents, I must decree in the present case in favour of the deed giving a preference to the plaintiff.

But if the assignment be of the whole bankrupt's estate to prefer any creditor, then it will be void.

Note; His Honour said, that if the assignment had been of all his goods and effects, or of all his estate, or of all his stock in trade, as goldsmith, &c., this had been too general, and would hardly have stood: but here it was not of the trader's own trade as goldsmith, but a small branch of a different trade, of a stock in wine, the whole not above 300*l.* and but two thirds of that (1).

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(1) Every act done with a *view* to defeat the bankrupt laws by giving a *preference* amongst creditors *contrary to the spirit of those laws*, is fraudulent, and *therefore void*, and, if by *deed*, in itself an act of bankruptcy, *Worsley* v. *De Mattos*, 1 Burr. 467. *Hague* v. *Rolliston*, 4 Burr. 2174. *Alderson* v. *Temple*, 4 Burr. 2235. *Linton* v. *Bartlet*, 3 Wils. 47. *Harman* v. *Fishar*, Cowp. 117. *Rust* v. *Cooper*, Cowp. 629. *Hassel* v. *Simpson*, 1 Bro. C. C. 99. and Doug. 89. n. S. C. *Devon* v. *Watts*, Doug. 86. *Butcher* v. *Easto*, Doug. 294. *Round* v. *Byde*, Cooke's Bank. Laws, 117 (*z*).

(*z*) So *Ex parte Scudamore*, 3 Ves. 85. *Hartshorn* v. *Slodden*, 2 B. & P. 582. *Dixon* v. *Baldwen*, 5 East. 175. *Dutton* v. *Morrison*, 17 Ves. 193, 1 Rose, 213. *Morgan* v. *Horseman*, 3 Taunt. 243. So, an assignment by deed of all or nearly all a trader's property, even for the benefit of all his creditors, and without a view to any fraudulent preference, is an act of bankruptcy, unless all the creditors assent to it; *Kettle* v. *Hammond*, Cooke's B. L. 89. *Tappenden* v. *Burgess*, 4 East, 230; because it puts the property in a course of distribution different from that ordained by the bankrupt laws. *Ex parte Bourne*, 16 Ves. 145. But by stat. 6. G. 4. c. 16. s. 4. an assignment of *all* a trader's property for the benefit of *all* his creditors by deed executed according to the regulations prescribed by the statute shall not be deemed an act of bankruptcy, unless a commission issue within six calendar months after the execution of the deed by the trader. A conveyance of part or the whole of a trader's property to trustees, to raise money by sale or mortgage for the purposes of his trade, is not an act of bankruptcy. *Berney* v. *Davison*, 1 Brod. & B. 408. *Berney* v. *Vyner*, ib. 482.

TERM. S. HILLARII, 1727.

Case 138. MARCHIONESS OF ANNANDALE *versus* HARRIS & e contra.

1 Eq. Ca. Ab. 87. pl. 6. A man having seduced an innocent woman, and having had a bastard by her, gives her a writing obliging himself to pay 2000*l.* after his death for the purchasing an annuity for the woman and the child for their lives, The man dies, equity will compel a performance of this agreement.

The Marquis of *Annandale* had unlawful familiarities with *Anne Harris* who was before a modest woman, but the Marquis seduced her, and had a child by her; and afterwards by deed poll reciting that he the Marquis had given a bond to the said *Anne Harris* for the payment of 2000*l.* to her within a year after his death; now by this deed the Marquis agreed that this 2000*l.* should be laid out in an annuity for the use and benefit of *Anne Harris* and the child for their lives. The Marquis died, and the Marchioness his widow administered.

There was (it seems) but one witness to the bond; and though his hand-writing was proved, yet he swearing that he did not see the bond sealed and delivered, the plaintiff *Anne Harris* was nonsuited at law.

[433] The Marchioness brought her bill in equity to be relieved against the bond and deed poll, as gained upon an unlawful and wicked consideration; and *Anne Harris* brought her cross bill to be paid the 2000*l.* out of the assets of the Marquis.

This bond could not be proved, and so was not produced; but the deed poll reciting the bond, and containing a covenant that the 2000*l.* should be laid out in this annuity, was proved and read.

It was urged on behalf of *Anne Harris*, that the known diversity was, where the (*a*) woman has before been a common strumpet, and draws in a young man to give such bond or covenant, in such case equity will relieve; but where the man seduces a woman who was before a modest woman, and gives such bond or covenant, there the obligor who has done

(*a*) 1 Vern. 483. 2 Vern. 188.

Marchioness of ANNANDALE *v.* HARRIS.

the injury, states and ascertains himself the damages, which are to be the *præmium pudicitiæ*, and no relief to be had in equity.

On the other side it was objected, that supposing equity would not relieve against such bond or covenant, yet it being a matter of turpitude, equity ought not to intermeddle, the consequence of which would be, that both bills should be dismissed, and that this Court should not lend any assistance, either on account of assets, or otherwise in such a case.

But to prove the contrary, the other side cited the case of *Ord* versus *Blacket*, where Sir *William Blacket* having seduced Mrs. *Ord* a young gentlewoman of good family and fortune, afterwards settled an annuity on her for years; but the estate was incumbered, and Mrs. *Ord* dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly.

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A. grants an annuity to a woman whom he had seduced, out of his manor of D. in which A. had no estate; equity will make him secure the annuity out of other lands.

They also cited the case of *Carew* versus *Safford* (*z*) decreed in the Exchequer about two years since, where the man granted an annuity to the woman out of the manor of *D.* when in fact he had no such manor, upon which that Court decreed him to settle this annuity on the woman out of other lands.

Lord Chancellor: If a man does mislead an innocent woman, it is both reason and justice he should make her a reparation; but this case is stronger in respect of the innocent child, whom the father has occasioned to be brought into the world in this shameful manner, and for whom in justice he ought to provide; and though the child be now dead, yet the case is to be taken as it was when the bond and covenant were given, and then the child was living.

2*dly*, The recital in the deed that the covenantor had given such a bond, is a sufficient evidence of there having been such (*y*); it is a confession by the obligor himself, and stronger than a verbal confession, it being under his hand and seal. Wherefore, if the Court allows this covenant to stand, it must then be in the same case as any other covenant or bond; con-

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(*z*) 3 Swan. 427. n. nom. *Carey* v. *Stafford*, S. C. Amb. 520.

(*y*) That is, against the covenantor, or persons claiming under him. *Ford* v. *Grey*, 1 Salk. 285. *Shelly* v. *Wright*, Willes, 11. *Battersbee* v. *Farrington*, 1 Swan. 113.

Marchioness of Annandale v. Harris.

sequently it is a debt, and being so, equity shall decree it to be paid out of assets (1).

This decree was affirmed in the House of Lords in *March* 1728 (2).

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(1) Vide *Cray* v. *Rooke*, Ca. temp. Talb. 153. *Clarke* v. *Periam*, 2 Atk. 333, 337. *Priest* v. *Parrot*, 2 Vez. 160 (*x*).

(2) 3 Bro. P. C. 445.

(*x*) *Lady Cox's Case*, post, 3 vol. 339. *Hill* v. *Spencer*, Amb. 641. *Franco* v. *Bolton*. 3 Ves. 368. *Gray* v. *Mathias*, 5 Ves. 286. *Gilham* v. *Locke*, 9 Ves. 612. *Matthews* v. *L——e*, 1 Madd. 558. *Binnington* v. *Wallis*, 4 B. & A. 650. *Knye* v. *Moore*, 1 S. & S. 61. 2 S. & S. 260.

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STEWARD *versus* ROE.

Case 139.

Lord Chancellor King. The original bill is to be first answered; but if the plaintiff after the cross bill filed, amend his bill, he loses his priority.

The original bill is to be first answered, but if the plaintiff in that bill will, after the cross bill filed, amend his bill in things material (*z*), this amended bill, as to the amendments, is a new bill, and the plaintiff in the original bill shall be bound to answer the cross bill, which was filed prior to the amendments made to the original bill, before such time as the said plaintiff in the original bill shall have an answer to his amendments, and as the amended bill must be answered all together, so the priority seems in such case to be lost as to the whole (1) (*w*).

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(1) Vide *Child* v. *Frederick*, ante, 1 vol. 266. *Long* v. *Burton*, 2 Atk. 218. *Rattray* v. *Darley*, 3 Atk. 724 (*y*).

(*z*) So, though the amendment is in matter immaterial. *Johnson* v. *Freer*, 2 Cox, 371. *Noel* v. *King*, 2 Madd. 392.

(*w*) So an original bill abated by the act of the plaintiff, and not revived till after a cross bill filed, loses its priority. *Smart* v. *Floyer*, Dick. 260. But the plaintiff in an original suit does not waive his priority by obtaining the common orders for time to answer the cross bill. *Harris* v. *Harris*, 1 Turner, 165.

(*y*) In *Dungan* v. *Coxon*, Exchequer, Hil. 7 G. 3., there was a bill and cross bill. The plaintiff in the original bill took exceptions to the answer, and the defendant submitted to the exceptions; and thereupon the plaintiff obtained an order to amend his bill, and for the defendant to answer the exceptions and amendments at the same time, and afterwards obtained an order for time to answer the cross bill; and after that (24 January 1767), obtained another order for time to answer the cross bill till a week after the plaintiff in the cross bill should have answered the original bill: and on a motion on affidavit of notice, (31 January), to discharge the last order for irregularity on the authority of 2 Wms. 435, the Court

WALTER EDWARDS and MARY his Wife, only Child of Richard Freeman, Esq.; late Lord Chancellor of Ireland, by Elizabeth his first Wife, one of the Daughters of Sir Anthony Keck. } Plaintiffs;

ANNE FREEMAN, Widow and Administratrix of the said Richard Freeman; and RICHARD FREEMAN, Esq., and ANNE FREEMAN Spinster, her Children by the said Richard Freeman. } Defendants.

CASE 140.

Lord Chancellor KING. RAYMOND, Chief Justice, Master of the Rolls, Mr. Just. PRICE.

3. Jur. N.S. 198. 4. M. & Cr. 660. 6. Sim. 402. 29. Ch. D. 262. 1907. 56. 149.

THE plaintiffs brought their bill to have a distributory share of the personal estate of *Richard Freeman*, Esq.; he dying intestate, and leaving a widow the defendant *Anne Freeman*, and one daughter by his first wife, (viz.) the plaintiff *Mary*, and a son * and a daughter by the second wife, (viz.) *Richard* and *Anne*.

1 Eq. Ca. Ab. 249. pl. 10. 2 Eq. Ca. Ab. 442. pl. 50, &c. 446, pl. 3, &c. Husband by marriage settlement secures a portion for daughters of the marriage, in default of issue male; there is one daughter only, the husband survives that wife, and marries again, leaves issue by the second wife, and dies intestate, the daughter by the first marriage being an infant and her portion not then due, if the daughter lives till the portion is due, it is an advancement pro tanto, and must be brought into hotchpot as to the other issue.

The case was thus: *Richard Freeman* the father on his marriage with his first wife *Elizabeth*, one of the daughters of Sir *Anthony Keck*, by articles dated the 19th of *February* 1693, in consideration of the marriage and of 4000*l.* portion, covenanted for himself and his heirs, with Sir *Anthony Keck*, that he the said *Richard Freeman* or his heirs, would within six months after request by Sir *Anthony*, his heirs, executors or administrators, settle all his lands in *Battsford*, &c. in *Gloucestershire* to the use of himself for life *sans* waste, remainder to trustees [*436]

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held that if the amendment arose out of the defendant's answer, the plaintiff had not by such amendment lost his priority; but desired it might be moved again, and the amendment might be looked into. And it being moved again a few days afterwards, and it appearing that by the original bill the plaintiff claimed an estate as heir of *Eliz. Jessop*, and the defendant claimed the same estate as heir, and the plaintiff prayed a discovery under whom the defendant claimed; and the defendant having set forth a pedigree different from what she had set forth in a former bill by her against a third person, the amendment charged that former suit, and the pedigree then set up by the defendant: the Court held that this being matter arising out of the defendant's answer, the plaintiff had not thereby lost his priority. But there being other matter relating to a fine levied of the estate, the Court were of opinion that the plaintiff had by the last amendment lost his priority, unless he would consent to strike out so much of the amendment as related to the fine; and on his consenting so to do, the motion was denied. MS. note in Serjt. *Hill*'s Viner, vol. 4. p. 444. Exchequer minute-book, 11 Feb. 1767.

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to preserve contingent remainders, remainder to *Elizabeth* his then intended wife for her jointure and in bar of dower, remainder to the first, &c. sons of the marriage in tail male successively, remainder to trustees for 500 years to raise portions for daughters, if but one daughter 5000*l.* if more 6000*l.* payable at eighteen or marriage, which should first happen, and to raise maintenances for such daughters till their portions should become payable, 80*l.* per annum if but one daughter, and ——— per annum if more than one.

Mr. *Freeman* covenanted, that these premises which were but 366*l.* per annum, were 500*l.* per annum excepting parliamentary taxes, and gave a bond in 8000*l.* penalty for the performance of the articles.

The marriage took effect, of which there was issue only a daughter the plaintiff *Mary*, and *Elizabeth* the wife died soon after the birth of the daughter, no settlement having been made pursuant to the articles.

About three years afterwards Mr. *Freeman* married the de-
[437] fendant *Anne Marshal*, and settled great part of the lands comprised in the articles, 230*l.* per annum, without giving any notice of the articles, and had issue the defendants *Richard* and *Anne*.

The 20th of *November* 1710, Mr. *Freeman* died in *Ireland* intestate, and his widow the defendant *Anne Freeman* took out administration to him, the plaintiff *Mary* being then eleven years old: who having since intermarried with the plaintiff *Walter Edwards*, they brought their bill for their distributory part of the intestate Mr. *Freeman*'s personal estate, but did not pray the 5000*l.*

The defendants by answer set forth the articles and bond, and insisted, that thereby the plaintiff *Mary* had a portion of 5000*l.* secured to her, and ought not to have any part of the personal estate of the intestate her father, unless she would bring that into hotchpot, to the intent the estate of all the children might be made equal.

This cause having been often argued, was at length decreed by the Lord Chancellor *King*, with the assistance of the Lord Chief Justice *Raymond*, Master of the Rolls, and Mr. Justice *Price*, who all agreed that this 5000*l.* should be brought into hotchpot.

Mr. Justice *Price*, though not present at the resolution, did acquaint the *Lord Chancellor* with his opinion.

Portions secured by settlement out of lands or articled so to be, are not to be paid out of the personal estate.

Sir *Joseph Jekyll* Master of the Rolls: 1*st*, I do not take this

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5000*l.* to be a debt due from the intestate, or to be paid out of his personal estate; for though there is a bond for performance of covenants from him, yet there is no covenant for the payment of the portion; the covenant is to settle lands, and to raise a term of 500 years out of them for securing the portion of 5000*l.*

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2*dly*, Though this settlement is only to be made on request, and none has been made, yet this cannot prejudice the party to whom the portion is due, for the covenantee is only a trustee, and the neglect of such shall not (*a*) prejudice the *cestui que trust:* which here is the stronger, forasmuch as the *cestui que trust* was an infant.

(*a*) Vide vol. 1. 631. Trevor v. Trevor, and Frederick v. Frederick, 710.

3*dly*, Supposing there was a covenant to settle absolutely within six months, and it were broken, so that damages might at law be recovered; nay, though there had been a covenant to pay the portion, yet the party to whom the portion is due, ought to come upon the land first, and in case of a deficiency there, then resort to the personal estate; for the articles to settle particular lands are in equity a settlement, and from the time of making these articles Mr. *Freeman* became a trustee of the lands, a trustee for the trusts in the articles.

It has been objected, that had there been a covenant to pay the portion, this had been like a mortgage, and the personal estate should have exonerated the land.

Resp. This is not like a mortgage; in the case of a mortgage, the land is only a pledge for the money borrowed, but here the original (1) agreement was, that the portion should be raised out of that very land. And for this I would only cite the case of *Coventry* and (*b*) *Coventry*, where the late Earl of *Coventry* covenanted on his intermarriage with the Countess dowager, that he would, according to the power given him by his family settlement, *or otherwise*, settle lands of 500*l.* per annum on his then intended wife. And on a bill brought by the Countess Dowager, to have this jointure made good to her,

(*b*) Ante 222.

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It was contended, that the Countess ought to resort to the personal estate, for that here were no particular lands covenanted to be settled, and the covenant was to settle lands of 500*l.* per annum pursuant to the power, *or otherwise;* but decreed by the Lord Chancellor *Macclesfield*, with the assistance of the Judges, that this covenant did bind the land, and that the words *or otherwise* were intended in favour of the jointress for her further security, in case the power should fail or prove

(1) Vide *Howel* v. *Price*, ante vol. 1. 294. *Evelyn* v. *Evelyn*, post 664.

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deficient; and if so, they were not to be made use of to her prejudice.

So that I do not think this is to be considered as a debt which by lessening the personal estate would diminish the distributive shares, for this 5000*l.* ought to be made good out of the real estate contracted to be settled, supposing there is enough left unsettled; but it must be agreed, that the land actually settled by Mr. *Freeman* on his second marriage without notice, though it be a breach of trust, yet such second settlement is good, and must take place against the articles, no more lands being liable to the articles, than are omitted out of the settlement on the second marriage (*z*).

As to the second point, whether the 5000*l.* portion thus secured by the articles to the plaintiff *Mary* is to be brought into hotchpot, before she shall come for any part of the personal estate?

I am of opinion it ought; the end and intent of the statute of distribution being to make the provision for all the children of the intestate equal, as near as could be estimated; and therefore this 5000*l.* ought to be collated into the personal estate. The design of the act was to do, what a good and a just parent ought for all his children; nor is this equality to be confined to such estates as children claim by voluntary settlements only, for (generally) provisions for children are by settlements made on marriage, which alone is a consideration; and the statute would be of little effect, if it were to extend to make a child bring only that into hotchpot which such child took by a voluntary settlement; marriage settlements are most frequent, *& ad ea quæ frequentius occurrunt, &c.*

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The intent of the statute of distribution was to make the provision for all the children equal, and do what a just and impartial father ought to do for his children.

I admit, that a provision for a child by (*a*) will (for a case may happen, that as to *part* of the personal estate the testator may die intestate) is not an advancement to be brought into hotchpot (*w*); neither shall land given by a will to a younger child; for a provision to be brought into hotchpot must be such as is made by an act in the intestate's life-time and not by will (*z*); any land provision to the heir at law of the intestate, however given, is privileged by the statute of distribution, and

(*a*) Vide Swinb. 165. A provision by a father for a child by will not to be brought into hotchpot, nor a provision of land for an heir.

(*z*) But if the parties contracting for a second settlement have notice of the first, such notice will bind the issue of the second marriage when they come into *esse*. *Le Neve* v. *Le Neve*, 1 Vez. 64. 3 Atk. 646. *Toulmin* v. *Steere*, 3 Mer. 210.

(*w*) *Cowper* v. *Scott*, post, 3 vol. 125.

(*z*) So *Walton* v. *Walton*, 14 Ves. 324.

not to be brought into hotchpot (*y*) : thus there are great variety of provisions which may be made by parents for children; and it could not be expected the statute of distribution should enumerate all of them; but as a contingent provision, when the contingency has happened, is a provision, so is it within the act; also as there are great variety of provisions, the times when they are to take effect may be various; but yet if such provisions be to take effect in a reasonable time, they shall be within the act. A child may be provided for by land, freehold or copyhold, or by a charge upon either, or by money, goods, stocks in companies, and those in some companies pretty precarious (*x*). Some provisions may be payable to the child when of age, or upon marriage, and these contingencies framed [441] upon infinite variety, as the several circumstances of the parties may require, which rendered it impossible for the act to mention all of them, and therefore it was proper for the legislature to make use of general words as they have done.

The statute of distribution does in the beginning take notice, that if a child (other than the heir) have a settlement of land made on him by the intestate, this shall be brought into hotchpot.

One settles a rent out of lands upon a younger child, this is an advancement pro tanto.

Now to think the statute did extend to land itself when settled on a younger child by the father, and not to a charge upon land for such child, is strange. Suppose it were a rent out of land, this would be an advancement, and why not when a charge upon land? But the present case comes nearer to land, than if it had been a charge out of land; for the trust of the 500 years term being only to raise this 5000*l.* portion, and the plaintiff *Mary Edwards* being the person who is alone entitled to it, she as to this purpose is in effect the owner of the 500 years term.

The occasion of making the statute of distribution.

The occasion of making the statute of distribution, was to put an end to the long contest which had been betwixt the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or bond to be given by the administrator for that purpose, the temporal courts sent a (*a*) pro-

(*a*) Vide vol. 1. Petit v. Smith, fol. 7. and 1 Lev. 233.

(*y*) Whether he be heir general, or special, as in borough English. *Lutwyche* v. *Lutwyche*, Ca. temp. Talb. 276. *Twisden* v. *Twisden*, 9 Ves. 425. Nor shall money laid out by the intestate in improving land, which he afterwards suffered to descend, be brought into hotchpot. *Smith* v. *Smith*, 5 Ves. 721.

(*x*) So, by a commission in the army, &c.; Note (O) to *Pusey* v. *Desbouverie*, post 3 vol. 317; an annuity, *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

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hibition, being of opinion, that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favour of the practice of the spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them, and the act intended to make the children's provision equal, which was agreeable to the civil law, where goods moveable, and immoveable (*i. e.* lands) are considered as the same, though our law would never let the civil law meddle with lands. In *Swinburne* 165, it is said, that if a father by deed settle an annuity on his child, to commence after his death, this is an advancement *pro tanto;* and by the same reason, a reversion settled on a child, as it may be valued, is an advancement also. The provision within the statute for a child need not take place in the father's life-time, a future provision is a bar *pro tanto,* a portion assured or secured to a child, though *in futuro,* is a provision according to its value.

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An annuity settled by a father upon a child is an advancement pro tanto.

A provision for a child by a father, though contingent, yet when the contingency happens, is an advancement pro tanto.

But it is objected, that this is a contingent provision, and therefore not an advancement within the statute, and being in contingency, it cannot be collated; for instance, suppose it were a bare possibility or what is not *debitum in præsenti.*

The right to the distributive share on the statute of distribution vests immediately on the intestate's death.

Resp. I do agree, this contingency did not vest until the plaintiff *Mary* came to eighteen, for though the term did arise before, yet no trust for her benefit could. But the statute of distribution does not appoint any time when the distribution shall be made, it mentions indeed when it shall not, viz. not within a year; and according to the resolutions, the right to the distributory shares vests immediately on the intestate's death. The personal estate of the intestate may consist of monies or debts payable at several future days, or upon contingencies, so that it may be impossible to make a distribution thereof at any certain time; it may consist of debts arising upon the like contingency as is annexed to this portion, and since those debts, as they fall in, may be distributed and valued, why may not a contingent portion be estimated and brought into hotchpot? but all that difficulty is over, by the contingency's having happened in the present case, and all inequality, as to the provisions for children, is prevented, which is the intent of the act.

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Lord Chief Justice *Raymond:* I agree with the *Master of the Rolls,* that this 5000*l.* ought to be brought into hotchpot by the plaintiff *Edwards* and his wife; the statute of distribution

does not break into any settlement that has been made by the father; it only meddles with what is left undisposed of by him, and of that only makes such a will for the intestate, as a father, free from the partiality of affections, would himself make; and this I may call a *parliamentary will.*

The statute of distribution affects only the personal estate undisposed of in order to make the provision of each child equal, but takes away nothing that has been given to any child.

The intention of making the provisions of the children equal, goes throughout the whole act; first it gives the two thirds of the personal estate (the mother being allowed her third) equally among all the children. But then the act takes it into consideration, that there may be some of the children who have received a portion or advancement before, but not so much as to make up their full share; in that case such child so advanced but in part, shall have so much more out of the intestate's personal estate as will suffice to make his share equal to that of the other children. The statute takes nothing away that has been given to any of the children, however unequal that may have been, how much soever that may exceed the remainder of the personal estate left by the intestate at his death, the child may, if he pleases, keep it all; if he be not contented, but would have more, then he must bring into hotchpot what he has before received; this manifestly seems to be the intention of the act, grounded upon the most just rule of equity, *equality.* There may be many cases in the books, where, in regard to the beneficial and remedial laws, the Judges have gone beyond the words to make the intent of the act take place, as in *Plowden* 467, *&c.* Here the words will bear the construction which I put upon them, and which is intended by the act, though not drawn with the greatest correctness.

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A provision made for a child either by a voluntary settlement, or for a good consideration, is an advancement pro tanto.

As to the settlement made upon the children, it was objected, 1*st*, that this statute extends only to voluntary settlements, and not to such as are made on marriage, wherein the issue are purchasers; and this is said to be as if an estate had been sold to the child, which surely had not been within the act.

Resp. If the child pays money for an estate, this is not a settlement upon, but a sale to the child; and it cannot be within the words or intent of the act that such purchase should be brought into hotchpot. The words of the act make no diversity betwixt a voluntary settlement and a marriage settlement, they mention settlements in general. The estate thus settled (though on marriage) upon the children, may have been purchased by the father, and lessened that part of the personal estate, which would otherwise have gone amongst all the other younger children. Great hardships might follow from that

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construction which the other side labour for; as suppose the father who made this plentiful provision of 5000*l.* for the only child by the first marriage, (which in the present case exceeded the plaintiff's own mother's portion by 1000*l.*) should die leaving but 200*l.* in such case it would be very hard the child, who has already had a portion of 5000*l.* out of the estate, should yet take away somewhat out of the inconsiderable portion of 200*l.* left for the other children; it cannot be intended, that if the intestate had made a will, he would thereby have ordered any such thing. Indeed the parliament intended, that if the intestate had married any of his children, given
[445] them a portion adequate to his then estate, and his circumstances in the world had afterwards improved, that the children before advanced should have the benefit of such increase.

So, though the portion be not paid, yet if secured to the child in the father's life-time, although not payable till after the father's death.

Object. But this is not a portion advanced for the child in the father's life-time.

Resp. That is not required by the act; if it be secured to the child in the life of the father, it is sufficient; but it is no ways material in what manner the same is secured. Suppose the father had covenanted with trustees to pay his child 100*l.* a week after his death, as the covenant would have been plainly good, so it had been a portion within the act.

But it is objected, that this depends upon a contingency arising after the intestate's death.

Resp. Then I would put the case a little further: Suppose I covenant to leave a child 1000*l.* if living a week after my death, would this contingency prevent its being a portion? prevent its being brought into hotchpot? Suppose the contingency were, that if the child had been living, one, two or three years after the intestate's death; surely this had been a portion, and to be brought into hotchpot: suppose it had been a bond instead of a covenant, or a mortgage instead of a bond, this would have made no diversity; I grant it could have been no provision, until the contingency happened; but it cannot be denied that when the contingency has happened, it is a provision. Though I agree the contingency should be so limited, as to arise in a reasonable time; and here it is so, at eighteen or marriage, which is providing the portion as soon as it can be wanted, with maintenance in the mean time. Can the parent
[446] of a child so provided for with such certainty intend that no regard should be had to this provision in the distribution of his estate among his other children?

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I agree any legacy given to a child (supposing the testator dies intestate as to the surplus of his estate) shall not be brought into hotchpot, because this legacy is not a provision secured by the parent in his life-time.

Object. Upon the death of the intestate the share of the personal estate vested (*a*) in the children, and consequently the entire share of the eldest daughter vested in her, without regard to the portion secured by the settlement, which being contingent must be lost, if the daughter had died before her age of eighteen or marriage, at which time the portion was payable.

(*a*) 3 Mod. 58. 1 Vern. 403. 2 Vern. 274.

Resp. The distributive share does not in all events vest in the issue on the intestate's death, because if there be a posthumous child, such child shall be let in for its share, though not *in esse* at the intestate's death (1).

Distributory share vests on the intestate's death, but not so as to exclude a posthumous child.

Object. If this contingency is not to be brought into hotchpot until it happens, what must become of the distribution in the mean while?

Resp. In this case, as the plaintiffs have brought their bill for the daughter's distributory part, and the defendants by their answer have put this, which was on a contingent provision, before the Court and in issue, I do not see but that the Court may make a distribution, and order, that if this contingency should happen, then the money shall be so distributed, as to make the other children by the second marriage equal in their portions with the plaintiff the only daughter by the first marriage. If an executor pays a legacy, on supposition that there are assets to pay all the other legacies, and there happens a deficiency, the Court will make the legatee who is paid his full legacy refund (*z*); *a fortiori* will the Court in the principal case, when the contingent portion is not paid, order that only so much of it shall be paid to the first daughter, as will put her upon an equality with the rest of the children.

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If an executor pays a legacy on a supposition that there are assets to pay all other legacies, and afterwards there is a deficiency of assets, the legatee must refund.

Object. There is no precedent of such a decree.

Resp. I believe that is owing to the equality intended by the act of parliament, which was understood to be so plain a case, that nobody ever thought it worth while to bring it as a

(1) *Wallis* v. *Hodson*, Barnard. 290, and 2 Atk. 115. S. C.

(*z*) See *Anon.* ante, 1 vol. 495.

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question before the Court; so I am of opinion this 5000*l.* ought to be brought into hotchpot by the plaintiff *Mary* the only daughter by that marriage.

Lord Chancellor: Mr. Justice *Price*, who is hindered by his indisposition from being present, has signified to me, that he is of the same opinion with the *Master of the Rolls* and my *Lord Chief Justice*, and as I myself am, that this 5000*l.* thus secured to the plaintiff *Mary*, the only daughter of Mr. *Freeman* by the first marriage, ought to be brought into hotchpot; and 2*dly*, That the lands not included in the settlement made on Mr. *Freeman*'s second marriage must stand liable for the raising of this 5000*l.* The statute of distribution says, one third shall belong to the wife, and the other two thirds to the intestate's children, except such children as shall have been advanced by the intestate in his life-time.

The occasion of making the statute of distribution.

The occasion of making this statute was, to put an end to the controversy betwixt the temporal * and spiritual courts. The ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. *Hughes* and *Hughes, Carter's Rep.* 125. 1 *Levinz*, 233. One died intestate leaving a considerable personal estate, and a son and a daughter, the son administered, and the daughter contended for a share in the spiritual court, where it was thought an hardship that the son should have all, and yet the daughter was prohibited at law. However this statute of distribution takes away the administrator's pretensions (which he before had made with success) of retaining the whole. It is true, that in case any child had been advanced by a freehold, the spiritual court would not meddle with that; but the act of parliament has therefore gone further than ever the spiritual court intended to go, to make this freehold settled upon a younger child by the father, be brought into hotchpot.

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Usual at the time of making the statute to make provisions for children by settlement, and therefore this to be taken an advancement pro tanto.

It is material, that at the time of making the statute of distribution, it was usual to provide for children by settlements, and therefore with great reason such a provision may be taken to be an advancement *pro tanto;* so an annuity out of land, or a charge upon land is to be brought into hotchpot by the children for the very same reason.

As to the objection, that this is no voluntary settlement, I answer, this was voluntary in the parents, who might have applied all of it for the benefit of the eldest son. Indeed, if the child had been a purchaser, or creditor of the father, it

could not be intended, that what was the child's purchase or debt should be brought into hotchpot.

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Object. This is a future and contingent provision, and to be taken as it was at the time of the father's death.

As contingent debts are within the statute, so must contingent provisions for children be.

This I admit; but as future contingent debts due to the intestate are within the clause of the statute, as to a distribution, so it is equally reasonable that future contingent provisions should be construed advancements *pro tanto*, as to the children; but this contingency must be limited to take effect within a reasonable time, as in the present case where it is payable at eighteen or marriage, with a provision for maintenance in the mean time. If the father advances for a daughter in marriage so much for a portion, this is a portion given for a valuable consideration, marriage and a settlement, and for that very reason an advancement to the daughter within the statute of distribution (*z*). This is an advancement *pro tanto* within the custom of *London*, upon which (1) custom the statute of distribution was in a good measure founded; and it can be no injustice to the child, because it is left to the election of the child thus advanced, whether she will collate or not; if the child be contented with what she has received, she may keep it. If the plaintiff the daughter in the present case had come before her age of eighteen demanding her distributory part, there had been some difficulty, whereas now there is none, the contingency being over; but as to the maintenance-money, 80*l.* a year secured by the father to the plaintiff the daughter, we are of opinion, this is not to be brought into hotchpot, no more than what is allowed or secured by the parent for the education of the child (*y*).

Maintenance-money for a child not taken to be an advancement, &c.

(1) *Holt* v. *Frederick*, ante 356. *Elliot* v. *Collier*, 1 Vez. 17.

(*z*) And the value of the provision for the wife and children of a child's marriage, as well as for the child himself, is to be brought into hotchpot. *Weyland* v. *Weyland*, 2 Atk. 632.

(*y*) See *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

CASE 141. EVANS *versus* COGAN.

Lord Chancellor KING. A BILL was brought to compel a conveyance of an house at *Bristol*, pursuant to an award.

Mother tenant for life of a house, remainder to her six daughters in fee, the mother and J. S. submit to an award touching the title to this house; arbitrators award that the mother shall procure the daughters to join in the conveyance thereof, the daughters are married and one is dead leaving an infant heir; J. S. brings a bill against the mother and daughters and their husbands, and the daughters examined in a former cause say, they are willing to convey; they are not bound touching any title to the freehold and inheritance.

2. Tu. Rep. 402. 30. Ch. D. 419. The case was, *Thomas Cogan* being seised in fee of an house at *Bristol*, devised it to his wife for life, remainder to his six daughters in fee equally, the plaintiff stopped up the ancient lights of the house, by building too near, and the widow bringing her action for stopping the lights, it came on to trial at the assizes at *Bristol*, and all matters in difference, as also the title to the house, were referred to arbitrators, who awarded that the plaintiff should pay 15*l.* costs to the mother, and also 155*l.* to the mother for the purchase of the house, and that she on payment thereof should convey the house to the plaintiff in fee.

The plaintiff paid the 15*l.* costs and brought a bill against the mother praying that she might convey the house, and procure the daughters to join in the conveyance.

Some of the daughters were examined by the mother the defendant in the former cause, and proved, that it was the plaintiff's own fault he had not the conveyance, for that he had possession of the house delivered to him, but occasioned the conveyance to be delayed by being unwilling to part with the purchase-money. Soon after the mother died; whereupon the [451] plaintiff now brought a new bill against the daughters, and against the husbands of such as were married, in order to compel them to convey, and to procure an infant heir of one of the daughters who was dead, to convey when of age.

It was much insisted upon, that as to such of the daughters as had been examined as witnesses for the mother in the former cause, wherein they swore they were willing and ready to join with the mother in the conveyance, and the mother by her answer swearing she was willing to convey, this was sufficient to shew their consent to the award.

On the other side it was said, that the award could only bind the mother, whose assets the plaintiff was at full liberty to follow; but as to the daughters, though they might be willing in their mother's life-time to make her easy, and rather than disoblige her, join in the conveyance, yet now the mother was dead, what induced them before to join was at an end. Besides

four of the daughters were married women, and so their answers could not bind the inheritance, nor their husbands; and that one of the daughters was dead leaving an infant heir who could not be bound, neither was he a party. EVANS *v.* COGAN.

Lord Chancellor: If the daughters had been sole, I should have taken their answers to be a consent to the award, and have decreed them to convey; but all but one of them being under coverture, and there being an infant heir of the deceased daughter, who is no party to the bill, I do not see how the answers of the married daughters can bind themselves, as to their inheritance, much less their husbands, and it is impossible to bind the infant heir. With regard to the only daughter who [452] is a feme sole, her undivided part, if it were decreed to the plaintiff, would be of no use to him.

Therefore dismiss the bill without costs, as to such part thereof as prays a conveyance. But with respect to the proceeding against the executrix of the mother to be recompensed out of her assets, though the executrix denies assets, yet the plaintiff, if he thinks it worth his while, shall be at liberty to proceed to be repaired in damages, for the not performing of the award.

GOODWIN *versus* ARCHER. CASE 142.

THE plaintiff who brought this bill was a servant to the *Genoese* ambassador, and consequently his person privileged by the (*a*) late act; it was moved that the plaintiff should not go on in his bill, until he gave security by a bond in 40*l.* penalty for the payment of costs of suit, if awarded against him, in the same manner as where a plaintiff is (1) beyond sea; and a precedent was cited, where the like order was made in the case of an ambassador's servant, plaintiff in this court, dated 25th of *July*, 8th of the late queen (*z*).

1 Eq. Ca. Ab. 350. pl. 4. If an ambassador's servant brings a bill, he must give security to answer costs, as being a person privileged.

(*a*) 7 Annæ, cap. 12.

Whereupon the defendant obtained an order that the plaintiff's proceedings should stay until he with a surety gave such bond in 40*l.* penalty for answering costs, if awarded (2).

(1) *Meliorucchy* v. *Meliorucchy*, 2 Vez. 24. *Gage* v. *Lady Stafford*, 2 Vez. 557. (2) So, *Anon.* Mos. 175 (*y*).

(*z*) But see as to the ambassador himself, *D. de Montellano* v. *Christin*, 5 M. & S. 503.

(*y*) So *Adderley* v. *Smith*, Dick. 355. Contra, where the bill in equity was to stay an action at law wherein the plaintiff in equity was defendant. *Fenwick* v. *Fortescue*, Bunb. 272.

DE

TERM. PASCHÆ, 1728.

CASE 143.

BALSH *versus* HYHAM.

Lord Chancellor KING. 2 Eq. Ca. Ab. 741. pl. 8. A. who is a trustee for B. of 1000*l.* South-sea stock, at the desire of B. borrows 4000*l.* on this stock of the Company, and B. receives the money, A. pays the 10*l.* per cent. upon the late act to be discharged of the loan; though B. forbade the payment, yet he is liable.

THE plaintiff was a trustee for the defendant of 1000*l. South-sea* stock, and at his desire in 1720, borrowed of the company 4000*l.* on a mortgage of the stock; the defendant the *cestui que trust* received the money borrowed; afterwards the (*a*) act of parliament was made, which provided, that if any of the borrowers would pay to the company 10*l.* per cent. before such a day, they should be discharged of the rest of the money borrowed.

(*a*) 7 Geo. 1. sess. 2. sect. 7.

36. Ch. D. 257.

The defendant the *cestui que trust* directed the trustee not to pay the 10*l.* per cent', alleging that he thought the borrowers were not obliged to pay to the company the money borrowed, but that it was in the election of the borrowers to forfeit the pledge.

There were some attempts to prove an agreement by the plaintiff the trustee and others to pay the money borrowed in

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compassion to the defendant the *cestui que trust*, and in regard to the losses by him sustained, but that proof was deficient.

The plaintiff who had thus mortgaged his stock to the company, and had permitted the defendant to receive the money, paid the 10*l.* per cent'. and brought a bill in equity to recover it as laid out for the defendant.

Whereupon for the defendant it was insisted, that this was an officious payment of the 10*l.* per cent', against his express directions, which (as the defendant's counsel objected) was not recoverable at law; for the act of parliament, had the money been recoverable there, would have given to the company more than 10*l.* per cent.' for the money borrowed, or at least would have made it compulsory upon the borrower to have paid this 10*l.* per cent.: and although there had been a

verdict at the suit of the company against one of the borrowers, yet that was not against the defendant: it was *res inter alios acta*, and might have been recovered on a faint defence, and therefore ought not to be any evidence against the defendant; *quod cur' concessit.*

Then the case was put, if there were a trust created for the payment of debts without specifying them, and as to one debt, the party interested in the estate charged, should forbid the trustees to pay it, alleging it at least to be a disputable one, and that he thought it no real or just debt; if the trustees should afterwards spontaneously pay this debt, they ought not to be allowed it: or supposing this in the principal case to be a debt, then as the plaintiff the trustee had paid down the money for the defendant the *cestui que trust*, it was recoverable at law in an action for money laid out to the use of the defendant; and the plaintiff having a remedy at law ought not to [455] come into equity for the recovery thereof.

Lord Chancellor: If the defendant had not only forbid the payment of this 10*l.* per cent', but had also offered security to indemnify the trustee in respect of it, this had been material, had the plaintiff afterwards paid the 10*l.* per cent. But the plaintiff had good reason to think, that he was liable to pay the whole money borrowed. When money is borrowed it ought to be paid, and though a pledge was given for it, if that proves insufficient, the borrower ought to be liable. If a mortgagor borrows money, though there be no (*a*) covenant in the mortgage deed to pay it, yet his executor has been decreed to pay the money in discharge of the land descended to the heir; but if in the present case there was only a hazard, the trustee ought not to continue liable to such hazard; on the contrary, as it is a rule that the *cestui que trust* ought to save the trustee harmless, as to all damages relating to the trust, so within the reason of that rule, where the plaintiff the trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the defendant the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, the plaintiff ought to be repaid.

(*a*) Salk. 450. 1 Vern. 436. Preced. in Chan. 2.

Therefore let the defendant pay to the plaintiff the 10*l.* per cent' paid by the plaintiff to the company, with interest and costs (1).

(1) Reg. Lib. A. 1727. fol. 316.

CASE 144.

ADDIS *versus* CLEMENT.

Lord Chancellor KING. 2 Eq. Ca. Ab. 348. pl. 15. One seised in fee and possessed by lease for twenty-one years of lands in D. devises all his lands in D. whereof he is seised, possessed or any ways interested in, to A. for life, remainder to B. in tail, remainder to C. for life, with power to make a jointure, remainder to trustees to preserve contingent remainders, &c. decreed the leasehold should pass as well as the freehold.

1. Young & C. 296.
1. Tu. & Le. 575.

THOMAS *Addis* seised in fee simple of some lands, and possessed of a lease for twenty-one years held of the church of *Hereford*, of other lands in *D.* all in the possession of *A.* and *B.* tenants thereof at certain rents, and it being by reason of the long unity of possession very difficult to distinguish the fee-simple from the leasehold premises, made his will dated the 19th of *October* 1717, and devised all his messuages, lands and tenements in the parish of *D.* which he then stood seised *or possessed of, or any ways interested in,* and which were in the possession of *A.* and *B.* unto his wife *Jane* for life, remainder to his brother *James Addis* and the heirs of his body; if then living, (of which the testator much doubted,) remainder if his brother *James* were then dead, or should die without issue, to the plaintiff *John Addis* for life, with a power to make a jointure, remainder to trustees during the life of the plaintiff in trust to support contingent remainders, remainder to the first, &c. son of the plaintiff *John Addis* in tail male successively, remainder to the testator's sister *Eleanor Bradshaw* for life, with remainder to her first, &c. son, in tail male, remainder to the testator's brother-in-law *Thomas Delahay* in fee; and all his goods and chattels, money and personal estate, after some legacies thereby given, were bequeathed to his wife *Jane Addis*, who was also made executrix. Soon after the testator died; the wife after ten years of the twenty-one were expired, renewed the lease with the church of *Hereford* for twenty-one years, for 36*l.* fine, and a guinea to the clerk for the drawing and engrossing the said lease; after the death of the testator and the widow, her executors all along paid the

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rent to the church, though the leasehold together with the freehold were all enjoyed by the plaintiff.

The sole question in this case was whether by the will of *Thomas Addis* the leasehold premises did pass as well as the freehold to the plaintiff who was the remainder-man for life, or whether they belonged to the widow and executrix of the testator *Thomas Addis* as part of his personal estate?

Against the plaintiff it was objected, that the leasehold premises, especially for so short a term as twenty-one years, could never have been intended by the testator to pass either for life or in tail, or to trustees to preserve contingent remainders, or that he thought of empowering the plaintiff the devisee for life to make a jointure thereof; but that here being some fee-

simple estate which would satisfy the words, the leasehold should go to the executors, and be included in the devise of the personal estate to the wife, the lease for years being personal estate. That the constant diversity was, where the testator had only a lease for years and made such will, there, rather than the will should be void, the lease should pass, and comply with the limitations as far as the nature of the estate would admit of; but where there was a fee-simple estate as well as a leasehold, there the will should operate only upon the fee-simple estate, and be satisfied with that, as was expressly resolved in *Cro. Car.* 292, *Rose* and *Bartlet*, where a man having lands in fee and leases for years, devised all his lands and tenements to his wife for life, with remainder over, this only passed the fee-simple lands. Now this was pretty near the principal case; the devise of all his lands there could not be a devise of more than all, *qui omne dat nihil excipit*, and in the present case the devise was of all the lands of which the testator was seised or possessed, or any ways interested in, which words could not [458] alter the case, since they would amount to no more than *all*, and the words *all that the testator was in possession of* might pass those lands which were in his possession, as these words *which the testator was any ways interested in* must be intended to signify the land which he was any ways interested in either in law or equity, and need not necessarily be intended to pass the leasehold estate; besides that such general words were (in all probability) put in by the scrivener without any instructions from the testator for that purpose, who, if he had intended to have passed the leasehold premises and that they should have gone according to these very improper limitations, would have expressly mentioned this leasehold in his will.

2*dly*, As to the long unity of possession of the leasehold premises with the fee-simple, it was said to be high time for the safety of the church, that the leasehold should be now severed and distinguished from the freehold, and that the longer this unity continued, the more difficult would it be to distinguish them.

3*dly*, It was argued that the plaintiff having permitted the executors of the wife to pay the rent for the leasehold premises, this was giving judgment against himself, and owning them (the executors) to have a right to the leasehold, and to be tenants to the church.

Lord Chancellor: The question upon this will of *Thomas Addis*, is whether the leasehold passes with the freehold?

I must own the limitations are improper, but then the words [459]

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of the will are very strong, *all the lands which the testator was seised or possessed of or any ways interested in;* which words *possessed of or interested in* properly refer to a leasehold estate, and distinguish the present case from that of *Rose* versus *Bartlet*, where the words *possessed of or any ways interested in* are not to be found.

And as this lease for twenty-one years was held of the church and always renewable, the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate therein, a kind of inheritance; and therefore the leasehold premises ought (I think) to pass by this will (1).

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(1) Et vide *Turner* v. *Husler*, 1 Bro. C. C. 78. *Lowther* v. *Cavendish*, Amb. 356 (*z*). But the authority of *Rose* v. *Bartlett* has been submitted to in *Day* v. *Trig*, ante 1 vol. 286. *Davis* v. *Gibbs*, post 3 vol. 26. *Knotsford* v. *Gardiner*, 2 Atk. 450 (*y*). *Pistol* v. *Riccardson*, in K. B. Hil. term, 1784. in which the testator, being seised of freehold estates of considerable annual value, and also possessed of two farms holden by leases, for a term of 1000 years each, by his will "gave, bequeathed and devised, all his manors, advowson, donation, right of patronage and presentation, and all and every his several messuages, lands, tenements and hereditaments whatsoever and wheresoever, *which he was seised of, interested in or entitled to*, lying and being within the several counties of N. C. W. and Y. to his son for life, with impeachment for all wilful waste, and from and after his decease to the heirs of his body," with a similar limitation to his daughter, and the heirs of her body, remainder to the heirs of the testator's family. He then gave his *personal estate* to his wife and daughter. This case was twice argued in K. B. and the Court upon very full consideration, and with some reluctance determined, that the two leasehold farms did not pass by this devise.—*Lord Mansfield* in delivering the judgment of the Court stated the will at length, and said, he did so in order to shew, that there were no words in the will except the clause of devise itself, which indicated any intention in the testator to convey the leasehold premises, and that although the words of the devise were very comprehensive, yet *a system of legal construction had been established by former cases* (especially *Rose* v. *Bartlet*, and *Davis* v. *Gibbs*) which precluded them from considering the intention of the testator on the *words of the devise*, as they otherwise might have done, and bound them in their decision of the principal case. (*N.B.* It seems that *Addis* v. *Clement* was not once adverted to in the consideration of *Pistol* v. *Riccardson*) (*x*). But this rule of construction does not extend to the case of a deed. *Doe* v. *Williams*, 1 H. Bl. 25.

(*z*) S. C. 1 Eden, 99.

(*y*) So *Chapman* v. *Hart*, 1 Vez. 271. *Whitaker* v. *Ambler*, 1 Eden, 151.

(*x*) *Lane* v. *Lord Stanhope*, 6 T. R. 345. But see *Thompson* v. *Lawley*, 5 Ves. 476. 2 Bos. & P. 303, *Watkins* v. *Lea*, 6 Ves. 633, in which the authority of the rule in *Rose* v. *Bartlet* is fully recognised, subject to exception in cases where the Court can collect the intention of the testator to have been that leaseholds should pass. So *Roe* v. *Bird*, 2 Black. Rep. 1301. *Woodhouse* v. *Meredith*, 1 Mer. 458.

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Then it was objected, that the defendant the executrix of the widow who had laid down the 36*l.* fine, should have interest for such fine.

But the Court denied this, in regard she was to have her life in the renewed lease by virtue of the will, and though she perhaps might not outlive the first year of the lease, yet she had her chance for it; so the Court denied any interest for the fine, but allowed the charges of the renewal (1).

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(1) On this subject vide *Verney* v. *Verney*, 1 Vez. 428. *Raw* v. *Chichester*, 1 Bro. C. C. 198. (note.) *Owen* v. *Williams*, 1 Bro. C. C. 199. (note.) *Pickering* v. *Vowles*, 1 Bro. C. C. 197. *Nightingale* v. *Lawson*, 1 Bro. C. C. 440 (*z*).

The same rule, with the same exception, applies to copyholds; and as to these, the testator's intention that they should pass will be inferred from a surrender to the use of his will. *Hawkins* v. *Leigh*, 1 Atk. 387. *Tendril* v. *Smith*, 2 Atk. 85. *Goodwyn* v. *Goodwyn*, 1 Vez. 226. *Gibson* v. *Lord Montfort*, 1 Vez. 485. *Byas* v. *Byas*, 2 Vez. 164. *Milbourn* v. *Milbourn*, 2 Bro. C. C. 64, 1 Cox, 247. *Lindopp* v. *Eborall*, 3 Bro. C. C. 188. *Brooke* v. *Gurney*, cited 5 Ves. 559. *Doe* v. *Lord Lucan*, 9 East, 448. *Church* v. *Mundy*, 12 Ves. 426, 15 Ves. 396. *Judd* v. *Pratt*, 13 Ves. 168, 15 Ves. 390. *Sampson* v. *Sampson*, 2 V. & B. 337. *Hodgson* v. *Merest*, 9 Price, 556.

(*z*) It is an established rule that if one having a particular interest in a leasehold estate (whether he be one of several joint lessees or partners, as in *Palmer* v. *Young*, 1 Vern. 276, *Keech* v. *Sandford*, Sel. Ca. Cha. 61. *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298, or a tenant for life under a will or settlement with remainder over, as in the principal case, or a mortgagee, as in *Rakestraw* v. *Brewer*, post, 511, obtains a renewal of the lease to himself, he shall be a trustee (after payment of the expences of the renewal with interest, *Manlove* v. *Bale*, 2 Vern. 84. *Hamilton* v. *Denny*, 1 Ba. & Be. 202.) for the benefit of all persons interested in the old lease. *Owen* v. *Williams*, Amb. 736. *Lawrence* v. *Maggs*, 1 Eden, 453. *Taster* v. *Marriott*, Amb. 668. *Raw* v. *Chichester*, ub. sup. and Amb. 715. S. C. 2 Dick. 480. nom. *Bromfield* v. *Chichester*. *Stone* v. *Theed*, 2 Bro. C. C. 243. *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291. *Bowles* v. *Stewart*, 1 Sch. & L. 209. *James* v. *Dean*, 11 Ves. 383, 15 Ves. 236. *Nesbitt* v. *Tredennick*, 1 Ba. & Be. 46. *Winslow* v. *Tighe*, 2 Ba. & Be. 195. *Eyre* v. *Dolphin*, 2 Ba. & Be. 298. *Stubbs* v. *Roth*, 2 Ba. & Be. 548. *Randall* v. *Russell*, 3 Mer. 190. But a tenant for life under a will of a leasehold estate is not obliged to renew the lease; unless the nature of the estate, or the terms of the will compel him so to do. *Nightingale* v. *Lawson*, *Stone* v. *Theed*, ub. sup. *Lock* v. *Lock*, 2 Vern. 666. *White* v. *White*, 4 Ves. 24, 5 Ves. 554, 9 Ves. 554. *Lord Milsintown* v. *Lord Mulgrave*, 3 Madd. 491, 5 Madd. 471. And if he renews where he is not obliged to do so, he is only bound to contribute to the expence of the renewal in proportion to the benefit which he derives therefrom. If therefore the lease is for lives, and the tenant for life is one of the cestuis que vie, he cannot be called upon to bear any part of the expence of renewal, because he can derive no benefit from it. *Verney* v. *Verney*, ub. sup. and Amb. 88. And if he pays money for a renewal, it will be a charge on the estate in remainder, with interest from the time when it was advanced, *Adderley* v. *Clavering*, 2 Bro. C. C. 659, 2 Cox, 192; which upon the principles laid down in *White* v. *White*,

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And forasmuch as the lessee had not sealed a counter-part of the lease, which the church of *Hereford* had insisted upon, to the end that they might have the covenant of the lessee for their security, for which reason the lease remained in a third person's hands, and was not delivered over to the widow and executrix of the testator:

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The Court ordered that the old lease should be surrendered, and that the church of *Hereford* should make a new lease for the old term which would be good (it being to commence from a time past) to the plaintiff the devisee of the real estate; and the plaintiff to repay to the executors of the widow, what had been paid by them to the church for the rent grown due after the widow's death (1).

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(1) Reg. Lib. A. 1727. fol. 449.

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9 Ves. 557, 8, should be compound interest. If the lease is for years, or for lives where the tenant for life is not one of the cestuis que vie, the proportions in which the expence of renewal is to be borne by the tenant for life and the remainder-man must be determined after the death of the former, according to the benefit they have respectively derived from the transaction. *Nightingale* v. *Lawson*, ub. sup. and 1 Cox, 181. *Stone* v. *Theed*, *White* v. *White*, ub. sup. *Allan* v. *Backhouse*, 2 V. & B. 65. And see *Colegrave* v. *Manby*, 6 Madd. 72. The grantee or devisee of an annuity for life out of a leasehold estate is not bound to contribute to the expence of renewal. *Moody* v. *Matthews*, 7 Ves. 174. *Maxwell* v. *Ashe*, 1 Bro. C. C. 444 n. 7 Ves. 184. But contra, as to the devisee, *Winslow* v. *Tighe*, *Stubbs* v. *Roth*, ub. sup.

CASE 145.

FAREWELL *versus* COKER.

Lord Chancellor KING.

2 Eq. Ca. Ab. 723. pl. 3.

MR. *Farewell* employed one *Bower* of ——— in *Somersetshire* as his solicitor in a cause in chancery, and *Bower* the solicitor employed Mr. *Walter Edwards* as his clerk in court.

A country client employs an attorney or solicitor in the country in a cause in chancery, the solicitor employs a clerk in chancery, the client in the country pays his solicitor, but the clerk in chancery is unpaid. The client not bound to pay the clerk in chancery; but if the latter has any papers in his hands, he may retain them.

Mr. *Farewell* paid *Bower* at several times about 800*l.* which he alleged was more than was due to him upon his bill. Mr. *Bower* died, and his widow administered to him. Mr. *Edwards* the clerk in chancery's bill continued unpaid, and he delivered out several papers, copies of depositions, and orders to other solicitors for the use of *Farewell* in order to an issue in this cause.

Mr. *Farewell* on petition got an order to tax *Bower*'s bill, alleging it was overpaid, upon which *Edwards* got an order *ex parte* from the Master of the Rolls, to stay the taxing of the bill and all proceedings till his bill paid.

On petition to the Lord Chancellor to set aside that order, many things were urged, as that the clerk in court was the sworn clerk, and to be taken care of by the Court as their officer; that even at the hearing of the cause the Lord Chancellor has stopped the same from proceeding, on the clerk in court's insisting to be paid, or secured his bill; and that it is at the peril of the country client to inquire and stop money for the payment of the clerk in court, to whom both the country solicitor and country client are at stake.

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Lord Chancellor: The client in the country employs only the attorney or solicitor in the country, and knows nothing of the clerk in court, where it is a cause in chancery, or of the entering clerk where it is a cause at law; and on the other hand the clerk in court, or entering clerk, being (generally) perfect strangers to the country client, give credit to the attorney or solicitor in the country only; so that if the country client pays his principal, who is the country attorney or solicitor, he is thereby discharged, and must not pay the same debt twice.

All I can do for the clerk in court is, to take no paper out of his hands till paid; and if any thing be remaining due in Mr. *Farewell*'s (the country client) hands, I will stop it, and the same shall be paid to *Edwards* the clerk in court (1). Also here being some proofs by affidavits of *Farewell*'s retaining *Edwards* to take care of the cause, let that be tried in an action at law to be brought by *Edwards* against *Farewell.*

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(1) Vide *Taylor* v. *Lewis,* 2 Vez. 111. and 3 Atk. 727. S. C. So in Courts of Law, *Waldron*'s case, 2 Stra. 1126. *Rex* v. *Smollett,* 3 Burr. 1313 (*z*).

(*z*) So in the case of a town agent for a country solicitor. *Ward* v. *Hepple,* 15 Ves. 297. *Ex parte Steele,* 16 Ves. 164. *Bray* v. *Hine,* 6 Price, 203.

DE

TERM. S. TRINITATIS, 1728.

CASE 146.

CARLETON *versus* BRIGHTWELL.

Master of the Rolls.
2 Eq. Ca. Ab. 773. pl. 10. 734. pl. 4.
A modus for tithe of corn for the inhabitants of such a tenement and the lands therewith usually enjoyed, void for uncertainty, in regard the tenement may be uninhabited, and the lands often shifted and let with other farms.

IN a bill for tithes in kind, the defendant insisted on several *modus's*, one of which was, that the inhabitants of such a tenement with the lands usually enjoyed therewith, had been accustomed to pay such a *modus* for tithe-corn (1).

Cur' : This is quite uncertain, the house may fall down, or be uninhabited, and then no *modus* will be payable; also nothing can be more uncertain than lands usually enjoyed with the tenement, since the lands let with a farm house may probably be often shifted (2).

Turkeys tithable, but if tithes are paid of eggs, then none to be paid for the chicken.

2*dly*, Tithes being demanded of turkeys, it was objected that in *Moor* 599, (*Hugton* versus *Prince*) it was said, that turkeys were things *feræ naturæ* and not tithable, any more than partridges, and that turkeys were not brought hither from beyond sea before Queen *Elizabeth*'s time.

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Cur' : I cannot see but that turkeys are birds as tame as hens or other poultry, and therefore must pay tithes (*z*); it is

(1) By the Register's book no such modus for tithe *corn* appears to have been in question in the cause, but the defendants by their answer insisted that "*all occupiers of farm houses* below "or on the North side of a lane call- "ed *Burfield Lane*, with the lands "*usually* occupied therewith, have "time out of mind paid 3*d.* at *Michael-* "*mas*, in each year, for each cow, and "*all* occupiers of farm houses above "the same lane, or on the South side "thereof, with the lands *usually* occu- "pied therewith, have time out of mind "paid 2*d.* yearly for each cow," in lieu of tithe of milk in kind. His Honour declared this modus to be uncertain, and directed an account. Reg. Lib. A. 1727. fol. 417.

(2) Vide *Chapman* v. *Monson*, post. 565.

(*z*) So *Brinklow* v. *Edmonds*, Bunb. 307.

true, if tithes be once paid of the eggs, there can be no demand made a second time in respect of the chicken hatched afterwards (*y*).

3*dly*, There was another demand made by the bill of the tithe of a corn-mill, and it was insisted, that every tenth toll-dish was due. 1 *Show.* 281. *Gumble* versus *Falkingham. Carth.* 215.

Mills are tithable, but they are to pay only a personal tithe of the clear gains after all manner of charges deducted.

But it was replied, that this matter was determined in the case of (1) *Chamberlain* versus *Kneate* in the House of Lords, upon an appeal from a decree of the Court of Exchequer, where the bill was brought for tithes of a malt-mill in *Tiverton* in *Devonshire*, and where the Lords determined, with the assistance of eight Judges (whereof *Holt*, C. J. was one), that mills were tithable, but that the same was a personal tithe, and so ought to be paid out of the clear gain after all manner of charges and expenses deducted; upon which authority the *Master of the Rolls* decreed the mill in question to pay tithes, but that they shall be paid only as a personal tithe (*w*).

In a bill for tithes in the Exchequer the Court decrees payment of tithes to the time of the filing the bill, but in Chancery, to the time of the decree; also where an infant is party, the Exchequer will not examine a witness viva voce, but the witness is to be examined on interrogatories in the office.

Note; In this case it was said and admitted, that in a bill brought by a parson for tithes, though the right thereto be ever so plain, yet in the Exchequer the decree is not that the defendant shall pay tithes for the (2) future, but that he shall account for and pay what tithe is due to the time of bringing the bill, but in the Court of Chancery it is to the time of the (3) decree. Likewise in the Exchequer, where an infant * is party and his interest is concerned, the Court does not allow of an order to examine a witness *viva voce* to prove a

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(1) 1 Eq. Ca. Ab. 366. pl. 3. and 1 Bro. P. C. 157. by the name of *Chamberlain* v. *Newte* (*x*), Et vide *Dodson* v. *Oliver*, Bunb. 73.

(2) But in *Chamberlain* v. *Newte*, (*ubi sup.*) the House of Lords ordered that the tithes should be continued to be paid in *future*.

(3) Vide Archbishop of *York* v. *Stapleton*, 2 Atk. 136. *Bell* v. *Read*, 3 Atk. 590 (*v*).

(*y*) And the tithes of turkeys are usually paid in the eggs, if custom does not otherwise determine. Com. Dig. Dismes. H. 9.

(*x*) S. C. 9 Vin. Ab. 39.

(*w*) The tithe of a corn-mill is a *prædial* tithe, so far as regards its locality, and the person to whom it is payable; but in the mode of payment, it is a *personal* tithe, and payable upon the net profit only. *Thomas* v. *Price*, *Wilson* v. *Mason*, *Gaches* v. *Haynes*, 3 Gwill. 871, 974, 1256. *Hall* v. *Machet*, 3 Anst. 915. *Filewood* v. *Kemp*, 1 Haggard, 491, 494, where *Talbot* v. *May*, 3 Atk. 17, contra, was cited and considered. *Manby* v. *Taylor*, 9 Price, 249.

(*v*) *Daws* v. *Benn*, Jacob, 97.

CARLETON *v.* BRIGHTWELL. deed or exhibit, but a witness must be examined in the office upon interrogatories.

CASE 147.

ANONYMUS.

Master of the Rolls, in the absence of Lord Chancellor KING. On time given to answer the defendant may put in a plea, for that is as an answer, and on oath, but cannot put in a demurrer.

THE defendant prayed time to answer, but afterwards put in a plea; upon which the *Solicitor General* moved to discharge the plea, the defendant having in his petition for time submitted to answer, and a plea, though on oath, is yet a dilatory answer.

1. Young & C. 179. 1. Keen. 196.

Resp. A demurrer after such petition for time to answer would be irregular (*z*), but a plea is an answer, and is upon oath as well as an answer (*y*), and so determined in *Lord Strafford*'s case (*x*), who pleaded after time prayed to answer.

Whereupon the *Master of the Rolls* ruled that this plea came in regularly. (1)

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(1) So, *Roberts* v. *Hartley*, 1 Bro. C. C. 56 (*w*).

(*z*) See *Curzon* v. *Lord de la Zouch*, 1 Swan. 185.

(*y*) Therefore it seems that a plea which may be put in without oath, as to which see Mitford, 243. *Wall* v. *Stubbs*, 2 V. & B. 354. —— v. *Davies*, 19 Ves. 81, is not an answer.

(*x*) Post, 3 vol. 81.

(*w*) *De Minckuitz* v. *Udney*, 16 Ves. 355.

1. Tu. Rep. 326.

CASE 148.

RANDAL *versus* RANDAL.

Lord Chancellor KING. 2 Eq. Ca. Ab. 27. pl. 31. Feme seised of a copyhold, on marriage of her daughter to J. S. surrenders it to the use of J. S. and his intended wife and the heirs of their bodies, remainder to J. S. in fee; the marriage takes effect; the husband signs a writing whereby he owns that the limitation of the remainder in fee to him was a mistake, and that it was intended to be to the wife, and accordingly covenants to stand seised of the remainder in fee in trust for the wife in fee; this is not a mere voluntary covenant, and equity will compel the performance of it.

A FEME seised of the reversion in fee of a copyhold estate in *Norfolk* expectant on her father's death, and having agreed to marry her daughter to *B.* articled to pay to *B.* at the said marriage 500*l.* and surrender the copyhold premises within two months after her father's death to the use of *B.* her intended son-in-law, and his heirs; upon which surrender the father of *B.* articled to pay her 500*l.* and by the same arti-

cles covenanted to settle certain freehold lands of about 80*l.* per annum, to the use of his son and his intended wife for their lives, remainder to the heirs of their bodies, remainder to the son in fee, which settlement the father accordingly made. The mother surrendered the copyhold to the use of the husband (the son-in-law) *in fee*, and the marriage having taken effect, soon afterwards the husband and wife and the wife's mother went to an attorney in the neighbourhood, and informed him that there had been a mistake in the mother's surrendering the copyhold to the use of the husband and his heirs, for that it was intended to settle the same upon the husband and wife and the heirs of their two bodies, remainder to the *heirs of the wife*, and that it was reasonable it should be so settled, it being the wife's mother's inheritance; wherefore they desired the attorney to rectify this mistake; but the husband withal desired it might not be done by way of surrender, because this might probably come to the knowledge of the husband's father, of whom the husband was in great awe, and who was a passionate and severe man towards him. Upon this the attorney drew a deed reciting the former surrender made by the mother of these copyhold premises to the use of the husband in fee, but taking notice at the same time that this was a mistake, it being intended to be settled on the husband and wife and the heirs of their bodies, remainder to the heirs of the wife; wherefore the husband covenanted that he would stand seised of the copyhold premises in trust for himself and his wife for their lives, remainder in trust to the heirs of their two bodies, remainder in trust for the wife and her heirs, with a covenant from the husband to convey the premises to these uses.

The husband had issue by his wife a daughter, and having upon his admittance to the copyhold premises surrendered them to the use of his will, was prevailed upon soon after by his father to make a will, and thereby devise this copyhold to his father and his heirs.

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The husband died, the wife and her daughter brought this bill against the father of the husband, insisting the mother was imposed upon by these articles, and the intention was, that the copyhold should be surrendered to the use of the husband and wife in tail, remainder to the wife in fee; that to rectify this mistake the deed of trust was made, and therefore the plaintiffs prayed that the husband's father, having got the legal estate of the copyhold by his son's will, should convey it according to the uses or trusts in the deed of trust.

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Against which it was urged by the defendant's counsel, 1*st*, That there was no proof of the mother's being imposed upon by the articles, but on the contrary the mother was to have, and did actually receive from the father, upon the making this surrender, 300*l.* consideration; and it was dangerous to admit of parol proof, in contradiction to the plain and express words of written articles; *quod cur' concessit.*

2*dly*, That this deed of trust was gained unduly by the mother of the wife from her son-in-law the husband, and being plainly a voluntary deed ought not to be made good in equity.

Lord Chancellor took time till the next day to consider of it; and the cause then coming on, Mr. Solicitor General *Talbot* insisted on behalf of the plaintiffs, that equity follows the law in this case; and as at law though a promise without a consideration was *nudum pactum*, and not sueable, yet a
[467] deed or covenant to pay money, or to do any act, having the solemnity of a deed, did import a consideration, and as it was sueable at law, so it was also in equity, unless it were to do something vain and unequitable, accordingly in 1 *Vern.* 427. *Beard* versus *Nuthal*, it is said *per cur'*, that an agreement, though voluntary, yet if under hand and seal, ought to be decreed in a court of equity; so in the case of *Husband* and *Pollard*, *Feb.* 1718-19, a father possessed of a term for years held of the church, and renewable every seven years, assigned this lease to his son in trust for himself for life, remainder in trust for the son, his executors, administrators and assigns, and the father covenanted to renew the lease every seven years as long as he should live; the son died, and the seven years passed, upon which the executors of the son brought a bill to compel the father to renew the lease; and decreed that the father should at his own expence renew it, though this was a voluntary covenant, and the bill had been brought by the executors, who seemed to be out of the consideration of blood, which might have supported the covenant as to the son. Likewise the case of *Wiseman* v. *Roper*, 21 Car. 1. 1 *Chan. Rep.* 84. where a voluntary covenant to make a settlement in the following extraordinary case was by the Court carried into execution: *A.* had married a wife without his father's consent, and the uncle of *A.* with an intent to reconcile him to his father, and for natural affection, covenanted, that in case the manor of *Dale* should descend to the uncle from his father, then the uncle would settle it upon himself for life, with remainder to his nephew and his wife for their lives, remainder

over; the manor of *Dale* did descend to the uncle, and the son and his wife brought a bill to compel the uncle to settle this manor, who was decreed to settle it accordingly, though this was a voluntary covenant; and what occasioned the greater question, and the searching into precedents, was, its being a covenant to settle a bare possibility, an estate before he had it, which the uncle might never have; but notwithstanding a specific performance was decreed even of this covenant.

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On the other side some precedents were cited, where in case either of a voluntary conveyance or covenant, equity would not help a defect in the one, or decree a specific execution of the other; and the case of (*a*) *Fursacre* versus *Robinson* was mentioned, where a man made a defective conveyance of a copyhold to his bastard child, with a covenant for further assurance; on a bill brought, and hearing before the *Master of the Rolls*, and upon appeal before Lord Chancellor *Cowper*, both the *Master of the Rolls* and the *Lord Chancellor* dismissed the bill, in regard it was a mere voluntary conveyance, though every one, even at common law, ought to maintain his own natural child.

(*a*) Preced. in Chan. 475.

Lord Chancellor: I would not enter into the consideration whether a court of equity will assist and make good a voluntary conveyance, when (possibly) precedents may be both ways; but I do not think this a mere voluntary conveyance; for when the husband of the daughter does by deed under his hand and seal declare, that he intended this copyhold in question should have been settled on himself and his wife, and the heirs of their two bodies, with remainder to the heirs of the wife, and to rectify the mistake that had been made in the limitation, and in consideration of natural love and affection, the husband covenants to stand seised of this copyhold in trust for himself for life, then to his wife for life, and to the heirs of their bodies, remainder to the heirs of the wife; I say, when the husband under his hand recites what his intent was, and that the conveyance of the copyhold in a different manner was a mistake, I must take the husband's intention to be as he himself recites it; taking this to be so, and that it was a mistake to make a conveyance of the copyhold in a different manner, then it was but justice in the husband to rectify this mistake, and settle the copyhold as was at first intended by the parties.

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So the Court decreed the devisee the father to settle the copyhold premises according to the limitations of the trusts in the deed, to the husband and wife for their lives, remainder to

RANDAL *v.* RANDAL. the heirs of the body of the husband and wife, remainder to the wife in fee (1).

(1) Reg. Lib. B. 1728. fol. 465.

CASE 149.

FORD *versus* FLEMING.

Lord Chancellor KING.

1 Eq. Ca. Abr. 302. pl. 3. One by will gives 100*l.* due to the testator for rent from B. and now in B.'s hands, afterwards the testator sues B. for this rent, and recovers it; yet this is no ademption of the legacy, for the testator's suing for it might have been occasioned by his thinking the debt in danger.

A. BY her will gave to her grandaughter *Mary Ford* 40*l.* out of a debt due to the testatrix from *J. S.* for rent, she the said *Mary Ford* allowing her part of the charge of recovering the same; and the testatrix by her will gave the residue of the rent due to her from *J. S.* to her grandson *William Weeden Ford*, he also allowing his part of what should be expended in the recovery thereof.

After the making the will, *A.* the testatrix sued for these arrears of rent, and received them in her life-time.

On a bill brought by the grandaughter for this 40*l.* Mr. *Ryder* on behalf of the defendant insisted, that the diversity taken in this case had been, if the debtor who cannot be com-
[470] pelled to keep it, voluntarily pays in the debt, so that it is his own act, and the creditor is bound to receive it, this is no ademption of the legacy, for it must be the act of the testatrix, and not the act of the debtor who is a third person, which is to revoke the will; but in the present case, where the testatrix called in the debt, nay sued for it, and would not suffer it to continue where it was, this was altering the condition and state of the thing bequeathed, and must consequently, as to that, be a revocation of the will; it was like the case where one devises land and afterwards disposes of it, this is a revocation; nay, though the feoffment be to the use of the testator and his heirs, nay even though it be to the use of the will; and it was observed, that the will intended this debt should continue until the time of the testatrix's death, because it was said the legatees should allow their proportion of the charges of recovering it.

To which it was replied, that this legacy being 40*l.* could not be called a specific legacy, but only so much money, and the debt due for rent was added in favour of the legatee, as a certain fund for payment of the legacy, and what was intended

in favour, and for the benefit of the legatee, ought not to be turned to his disadvantage; and the case of *Orm* and *Smith*, 2 *Vern.* 681. as also *Poulet*'s case in *Raymond* 335. were cited as in point, where though the debt bequeathed was called in and received by the testatrix herself in her life-time, yet it was resolved this did not avoid the legacy, for that the receiving in the debt increased the personal estate, which was to answer the legacy.

Lord Chancellor took time till the next day to consider of this case, and observed that the authorities of the books were, that though the testator called in the debt, yet it was no ademption of the legacy; and so were the two cases cited, *Poulet*'s case in *Raymond*, and also in *Swinb.* 452. and that the reason given why the testator's calling in the legacy should not be an ademption thereof was, because it must be presumed to have proceeded from the testator's apprehension the debt was in danger (*a*) and therefore to have been done in favour of the legatee, to the intent he might not lose his legacy, and what was done out of kindness to the legatee, ought not to be interpreted to his prejudice.

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(*a*) See the case of Earl of Thomond v. Earl of Suffolk, vol. 1. 464.

His Lordship took notice, how the same action had been construed in two such opposite senses; however, he held, upon the authorities aforesaid, that the testatrix's receiving in the debt herself, though upon her suing for it, was no ademption of the legacy (1).

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(1) Vide *Earl of Thomond* v. *Earl of Suffolk*, ante 1 vol. 461. *Rider* v. *Wager*, ante 330.

5 Sim. 266.

1 Keen. 565.

3 Bea. 163. PAPILLON *versus* VOICE. CASE 150.

A. DEVISED 10,000*l.* to trustees to be laid out in a purchase of lands, and to be settled on *B.* for life, without impeachment of waste, and from and after the determination of that estate

At the Rolls. 1 Eq. Ca. Ab. 185. pl. 30. 2 Kel. in Cha. 27. 34.

A. devised 10,000*l.* to trustees in trust to be laid out in lands and to be settled on B. for life, without waste, remainder to trustees and their heirs for the life of B. to support contingent remainders, with a power to B. to make a jointure, remainder to the heirs of the body of B. remainders over, and by the same will devises lands to B. to the same uses, and dies leaving C. executor; B. sues C. the executor for the deeds relating to the lands that are in his hands, and to have the money laid out in lands and settled. Decreed by the Master of the Rolls, that B. had but an estate for life in the lands, and so not entitled to the deeds, but that they were to be brought into Court, and that the lands to be bought with the money, were to be settled on B. for his life only, remainder to his first, &c. son. But by the opinion of Lord Chancellor King, B. was decreed to have an estate-tail in the lands devised, and consequently to be entitled to the deeds relating thereto, though as to the lands to be purchased, that being executory, and in the power of the Court, B. was to be but tenant for life, with remainder to his first, &c. son.

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to trustees and their heirs during the life of *B.* to preserve contingent remainders, remainder to the heirs of the body of *B.* with remainders over, with a power to *B.* to make a jointure; and by the same will *A.* devised lands to *B.* for his life without
[472] waste, and from and after the determination of that estate, to trustees and their heirs during the life of *B.* to preserve contingent remainders, remainder to the heirs of the body of *B.* remainders over, and died leaving *C.* executor.

B. brings his bill against the executor to have the 10,000*l.* laid out in land, and settled in the same manner, and with the like limitations as the land was devised by the will, by which it was insisted a plain estate-tail vested in *B.* and also that *C.* the executor should deliver to *B.* the writings relating to the land devised, he being entitled to the inheritance.

For the plaintiff it was urged to be an universal rule, without any exception, that where lands are limited to one for life, with a subsequent limitation either mediate or immediate, to the heirs or heirs male of his body, in all those cases the tenant for life has a vested remainder in (*a*) tail in himself, and the words [heirs] or [heirs male of his body] are words of limitation, and not of purchase, which rule was said to hold in all sorts of conveyances as well in wills as deeds.

(*a*) 1 Inst. 22. b. 319. b.

Thus in the case of *King* versus *Melling*, 1 *Vent.* 225. 2 *Levinz.* 58. where lands were devised to *A.* for life, and after his decease to the issue of the body of *A.* by a second wife, and for want of such issue to *B.* in fee, with power to *A.* to make a jointure on a second wife, Lord Chief Justice *Hale* was of opinion, that this was an estate-tail in *A.* and though the three other Judges in *B. R.* were of a contrary opinion, yet upon error brought in the Exchequer Chamber, the judgment in *B. R.* was reversed, and judgment there given according to the opinion of the Chief Justice, which was said to be a much
[473] stronger case than the case at bar, in regard there was in that case not only an express estate for life, with the like power for the tenant for life to make a jointure, (as in the present case); but the remainder was to the *issue* of the body of *A.* which was construed to give an estate-tail to *A.* though the same words in a deed would not make an estate-tail. Also the case of (*b*) *Bale* versus *Coleman* was cited as determined by Lord *Harcourt*, where lands were devised to be sold to pay debts, and after debts paid, the trustees were to convey the residue of the lands unsold to *A.* for life, remainder to the heirs male of his body; and though Lord *Cowper* declared, that this being a case where the Court was to direct a conveyance to be made, and

(*b*) See vol. 1. 145.

therefore executory in its nature, it should be construed like articles, for which reason his Lordship directed the conveyance to be made to *A.* for life, with remainder to trustees to preserve contingent remainders, remainder to the first, &c. son of *A.* in tail male successively, remainder to the daughters in tail general; yet on a rehearing before Lord *Harcourt*, this decree was reversed, being the case of a devise of a trust of land which ought to be taken as a devise of the land itself; and if this had been such, a court of equity must have taken the words of the will as they found them, so the decree ought to be, and his Lordship accordingly did decree, that the trustees should convey the estate to *A.* for life, with remainder to the heirs male of the body of *A.* which made a plain estate-tail in *A.* and there was the like reason that the conveyance of the trust directed by the will should in the present case follow the words of the will. That the power for *B.* the devisee to make a jointure, was no indication that only an estate for life, and not an estate-tail was intended to pass, because, though tenant in tail could make a jointure, yet he could not do this without destroying the estate-tail, by levying a fine and suffering a recovery; whereas the testator's intention might reasonably be, [474] that *B.* the intended tenant in tail should make a jointure for his wife, without cutting off the entail. That in case of wills, legal estates, or any voluntary conveyance, equity ought not to interpose or give assistance one way or other, but leave it to the law, where *B.* the devisee being clearly entitled to an estate-tail, had consequently a good claim to the writings. That the rule touching limitations of estates, where an estate for life was given to *A.* with a mediate or immediate remainder to the heirs or heirs male of his body, gave an estate-tail to *A.* and that the word [heirs] was a technical word, was very well known and depended upon, insomuch that it would be dangerous to titles to shake or suffer this rule to be disputed (1).

(1) Lord *Harcourt*'s decree upon the rehearing in *Bale* v. *Coleman* was as follows, viz. "His Lordship declared, that this case arising upon the words of a will was much different from the several cases decreed in this Court upon marriage articles; that such articles are always intended to be carried into a further and more perfect execution; that the parties to such articles are to be considered as purchasers, and in a court of equity ought to have their contracts executed according to their true intent and the nature and course of marriage articles and settlements, on making whereof the issue male of the marriage are particularly regarded, and generally taken as purchasers; that when by the careless penning of marriage articles the contract is expressed in consideration of an intended marriage and portion to settle the husband's estate to the use of him and his intended wife and the heirs males of

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As to the case of the money directed to be laid out in land and settled as above, if it should be thought clear (as it was apprehended to be) that the word [heirs] must be taken as a word of limitation, and to create an estate-tail in one part of the will, where the land was devised, it was impossible but that the same words of the same man in the same will must have an uniform signification, and consequently that *B.* must have an estate-tail in the lands to be purchased with the 10,000*l.* land and money to be laid out in land being the same.

On the other side it was said, that as to the rule laid down, where an estate is given to one for life, with remainder (me-

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their bodies or the like, that general limitation has been restrained in this Court, when an execution of the marriage articles and agreement had been decreed, to an estate to the husband for his life, with a remainder to his first and other sons in tail-male, for that it could not reasonably be supposed a valuable consideration was agreed to be given to have an estate so settled that the husband might destroy or bar the settlement as soon as he should make it, but that no one case has been cited where the like decree has been made upon the words of a will, under which the devisees claim voluntarily; that in this case the question arose upon the words in the codicil, and all wills ought to be construed according to the true intent of the testator, so as such intent appear with certainty and be consistent with the rules of law, and that the same words of limitation *ought to receive the same construction in a court of equity as they have at law;* that the same words in a will which *at law* would create a legal entail ought to be construed *by this Court, when they fall under a trust and are to be carried into further execution* (as in the present case), so as to create an *equitable entail;* and that in this case by the words of the codicil according to the known rule and construction of law the testator has given to the plaintiff an estate tail of the defendant *Elizabeth Bale*'s share or dividend after her decease, and subject to her power of leasing of the residue of his estate after his debts and legacies paid; and that in this case it could not be inferred with any certainty from the power of leasing given to the plaintiff, that the devisor intended he should not have an estate tail, as the words plainly import, because such power of leasing was more beneficial than the power of leasing given by the 38 *Henry* 8. to tenants in tail; and it being admitted in the pleadings that the debts and legacies are paid, that therefore the same construction ought to be made as if no trust had been, and then in construction of law it will be an estate tail executed: And upon the whole matter doth think fit and so order, That the said decree, so far as it directs conveying the said fourth part of the said estate after the death of the plaintiff *C. Bale* to the use of the first, second, and third, and all and every other the son and sons of the said *C. Bale*, junior, and the heirs males of the bodies of such first and other sons, be reversed and discharged, and instead thereof that the said *Eliz. Bale*'s share or fourth part of the said estate be conveyed after the death of *C. Bale*, junior, to the use of the heirs male of the body of the said *C. Bale*, and for default of such issue to the use of the defendant *Coleman* and *William Bogan*, their heirs and assigns, equally to be divided between them, and that the Master to whom the matter by the said former decree stands referred, do see the said *Eliz. Bale*'s part settled accordingly.

diate or immediate) to the heirs or heirs male of his body, this made an estate tail, and the word [heirs] was a word of limitation and not of purchase, the same did not extend to the case of a will, as appeared from no case having been cited to that purpose. The only rule in construction of wills was, the intention of the party ought to take place, however improperly expressed. Now it was impossible by words to express the intention plainer than the testator had done in this case; and it would be a downright violation of his intention to construe the estate devised to *B.* to be an estate tail. For 1*st*, the estate was devised to *B.* for his life expressly. 2*dly*, It was to *B.* without impeachment of waste, which would be vain words, if *B.* were to have more than an estate for life. 3*dly*, The estate was devised to trustees during the life of *B.* to preserve contingent remainders, so that the testator expressed his intention, that the remainders limited to the issue of *B.* should be contingent remainders; and what could be more contradictory to this express and plain intent, than to say, these remainders shall not be contingent, but give a vested estate-tail to *B.*? As to the notion, that the conveyance directed by a will should be in the words made use of in the will, it was impossible this rule could universally hold; for suppose the direction of the will was, that the trustee should convey the lands to *A.* for life, remainder to *B. for ever*, this in a deed would not convey a fee, as it would in a will, and therefore there was no necessity the words in the conveyance should pursue those in the will: so if the words of the will had directed the estate to be conveyed to *A.* for life, remainder to the *issue of his body* (he having none at that time born) this would be an estate-tail, but in a deed it would not be so. Again, if the words in a will were, that the conveyance should be to *A.* and his *heirs male*, this would be an estate-tail; but put such words into a deed, and there, for want of saying of whose body the heir must be, they would give a fee-simple, *quod fuit concessum per cur'*. It was also observed, that if the words of a will be dark and doubtful, it would be quite improper for equity to direct a conveyance in such words; for that would be to decree in a court of equity a suit at law; whereas the office of a court of equity is to explain the words, and put such a construction upon them, as that a proper legal conveyance may be made of the premises; and therefore it would be absurd to admit the rule laid down by the other side to be an universal rule. The case of *Backhouse* versus *Wells* was cited, which was determined *Hill.* 12 *Annæ*, *B. R.* during the time that Lord *Macclesfield*

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presided there, where the case was, that *A.* seised in fee devised the premises to *B.* to hold to him for the term of his natural life only, without impeachment of waste, and from and after his decease to the issue male of his body, (if God should bless him with issue) and to the heirs male of such issue male, and for want of such issue, the testator limited two remainders over in the same words. And it was adjudged that *B.* took but an estate for life, the estate being given to him for life only, and there was a limitation afterwards to the heirs male of his issue, which was a description of the person, who was to take the estate-tail. To which it was added, that however with respect to the lands devised, the Court might construe *B.* to have an estate-tail therein, yet as to the 10,000*l.* which was to be laid out in lands, and to be settled on *B.* for life, &c. admitting that the devise of the legal estate of the land devised was out of the power of a court of equity to model and alter, (though the plain intention of the party were otherwise) yet this money to be laid out in lands was executory, plainly in the power of the Court, and of a court of equity too, for which reason, and where no rule of law was to be broken, it was hoped a purchase would be directed to be made with this money, and a settlement decreed in such manner as that the meaning of the party might take effect.

[477] *Master of the Rolls:* I have not heard any case cited, nor do I know of any at present, where lands being devised to *A.* for life, remainder to the heirs of his body, this in case of a will has been construed an estate-tail in *A.* The intent of this will is most plain, but how far consistent with the rules of law, and also how far the same words *heirs of the body* in the same will may be construed, as to the devise *of lands*, to be words of limitation, and yet in the devise of lands *to be bought*, words of purchase, I shall consider; but this is a new case.

Afterwards on the —— of *December* following, the *Master of the Rolls* having taken time to consider of this matter solemnly gave his opinion, that as to the devise of the lands in this case, an estate for life only passed to the plaintiff *B.* with remainder to the heirs of his body by purchase; and therefore the plaintiff should not have the writings delivered to him, but these should be brought into Court; and that as to the money to be laid out in lands, and to be settled to the same uses, the Court had most evidently power over that, which therefore should be settled so as to make the plaintiff tenant for life only,

and that his sons should take in tail male successively, &c. according to the intention of the testator (1).

But the cause coming (a) afterwards upon an appeal before Lord Chancellor *King*, his lordship declared, as to that part of the case where the lands were devised to *B.* for life, though said to be without waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of *B.* this remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate-tail in *B.* †; and that the breaking into this rule, would occasion the utmost uncertainty; wherefore the writings and title deeds of this estate ought to be delivered to *B.* the plaintiff: But,

(a) Hill. Term. 1731.

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As to the other point *Lord Chancellor* declared the Court had a power over the money directed by the will to be invested in land; that the diversity (2) was, where the will passes a legal

† Though this was Lord Chancellor's opinion, yet the question as to the land devised was given up, the plaintiff having brought a supplemental bill, whereby it appeared that by his father's marriage-articles he was entitled to an estate-tail.

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(1) 1 Reg. Lib. B. 1727. fol. 336.

(2) In many of the cases on this subject the distinction has been taken, and relied upon, between legal and equitable estates, but from *Austen* v. *Taylor*, Amb. 376. (z) *Doe* v. *Laming*, 2 Burr. 1108. the opinion of *Buller*, Just. in *Hodgson* v. *Ambrose*, Doug. 337. and *Jones* v. *Morgan*, 1 Bro. C. C. 206. it seems that such distinction does not now prevail in courts either of law or equity; that the rules of the two courts are perfectly concurrent on these points; that in both, the intention of the testator is equally attended to, and the same latitude admitted in the *construction* of words: that where the testator uses technical words *only*, their technical meaning must be adopted, but where it can be sufficiently collected from the context that he means them in any other sense, his intention shall prevail against their technical import; and therefore a limitation to *heirs*, without farther explanation, (the ancestor taking an estate of freehold by the same instrument) can never give an estate by purchase, as decided by *Colson* v. *Colson*, 2 Atk. 246. the objections to which case do not tend to prove, that the testator used the words "heirs of the body" in any other than their technical meaning, but merely, that he intended an estate for life only to the ancestor, and an estate by *purchase* to the heirs of the body; which the law would not permit; whereas, had the *former* intention been demonstrable, it should have prevailed (y), the rule of law *not being applicable to the construction of words, but to the nature and operation of the estate or interest devised.* (See the other cases on this subject in *Bale* v. *Coleman*, ante, 1 vol. 142.) But the distinction, which has been made between trusts *executed* and *executory*, seems to have occasioned greater difference of opinion. Vide *Lord Glenorchy* v. *Bosville*, Ca. temp. Tal. 3. *Roberts* v. *Dixwell*, 1 Atk. 607. *Wright*

(z) S. C. 1 Eden, 361.

(y) See note (z) to *Thomas* v. *Bennet*, ante, 342.

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estate, and where it is only executory, and the party must come to this Court, in order to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law; so that as to the lands to be purchased they should not be limited to *B.* for life, with power, &c. remainder to the heirs of his body, but to *B.* for life, with power, &c. remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male, remainder over, &c. (1)

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v. *Pearson*, Fearn's Cont. Rem. 4th edit. 187, and Amb. 358. S. C. (*x*) *Austen* v. *Taylor*, Amb. 376. *White* v. *Carter*, Amb. 670. (*w*) *Bagshaw* v. *Spencer*, 1 Vez. 152. (*v*)

(1) Reg. Lib. B. 1731, fol. 160. For the subsequent proceedings in this cause, vide *Smythe* v. *Clay*, Amb. 645. and 6 Bro. P. C. 395.

(*x*) S. C. 1 Eden, 119.

(*w*) S. C. 2 Eden, 366.

(*v*) *Bastard* v. *Proby*, 2 Cox, 6. *Dodson* v. *Hay*, 3 Bro. C. C. 404. *Leonard* v. *E. of Sussex*, 2 Vern. 526. *Exell* v. *Wallace*, 2 Vez. 323. This distinction appears to be now fully established. *Countess of Lincoln* v. *Duke of Newcastle*, 12 Ves. 227. *Stratford* v. *Powell*, 1 Ba. & Be. 1. *Green* v. *Stephens*, 17 Ves. 64. *Blackburn* v. *Stables*, 2 V. & B. 367. *Synge* v. *Hales*, 2 Ba. & Be. 499. *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 559. *Lord Deerhurst* v. *Duke of St. Albans*, 5 Madd. 232.

1914. 1. Ch. 849.

CASE 151.

LAUNDY *versus* WILLIAMS.

Lord Chancellor KING.

1 Eq. Ca. Ab. 299. pl. 3. 2 Eq. Ca. Ab. 561. pl. 9. 8 Vin. ab. 404. If I devise a legacy of 100*l.* to A. payable at his age of 21, and A. dies before 21, A.'s executors or administrators shall not have that legacy till such time as A. (had he lived) should have attained 21, and my executors shall have the interest in the mean time. But if I give a legacy to A of 100*l.* payable at his age of 21, and if he dies before, then to B. and A. dies before 21, B. shall have the legacy presently, and not stay till such time as A. should have come to 21.

SAMUEL *Laundy* having several children, by will dated the 8th of *November* 1721, devised to his son *Samuel Laundy* 230*l.* *to be paid at his age of twenty-one;* to his son *Whitmore Laundy* 210*l.* at his age of twenty-one; to his son *Edward Laundy* (yet an infant) 210*l.* at his age of twenty-one; to his daughter * the plaintiff *Anne Laundy* 150*l.* at her age of twenty-one, and made his wife the defendant *Rebecca* executrix and residuary legatee. There was a clause in the will, *that if any of his sons and daughters should die before his, her, or their respective ages of twenty-one, then the legacy or legacies of him, her, or them so dying, should be paid to the survivors or survivor of such children.* The daughter was paid her legacy of 150*l.* having attained her age, also the plaintiff *Samuel* having attained his age of twenty-one received his

legacy of 230*l.* *Whitmore Laundy* died at the age of eleven, and now the plaintiff *Samuel Laundy* the eldest son and *Anne* the daughter, who had attained their ages of twenty-one, brought this bill against the executrix *Rebecca*, to have their two-thirds of *Whitmore Laundy*'s 210*l.* paid over to them, *Edward Laundy* the other son being yet an infant of about twelve years old.

For the defendant it was insisted, that the plaintiffs came before their time, forasmuch as they ought to stay for their share of the deceased infant's legacy of 210*l.* until the deceased infant should have come to the age of twenty-one years, in case he had lived. For 1*st*, the word [then] if any of the children should die before twenty-one, *then* the legacy of him, her or them so dying should go to the survivors or survivor, must be intended, in such case, or if such fact happened, and was not to be construed in relation to any time, or to signify, that on the death of any of the children, then at that time the legacy was to be paid. 2*dly*, Legatees over, in case any of the first legatees should die before twenty-one, were only substituted, and could not be in a better condition than the original legatees were; consequently, as these could not take till their ages of twenty-one, by the same reason they that came in their places should not take until the original legatees might (had they lived) have attained that age. 3*dly*, It was to be [480] presumed the testator had considered with himself when and at what respective times his estate would bear the payment of these several legacies, and that he had determined the legacies to his children should be paid at their ages of twenty-one, and in the mean time the residuary legatee should have them, and that it was unreasonable the death of one of the legatees under the age of twenty-one should accelerate the payment, or prejudice the residuary legatee, who otherwise would certainly have had the benefit of the interest, until the deceased infant should have come to twenty-one.

And of this opinion was the Lord Chancellor, who pronounced his decree accordingly.

But on the following day Mr. Solicitor General mentioning the matter again, and insisting that it had been determined otherwise, and that the difference was betwixt the executor or administrator of the first legatee, and the devisee over; if I give a legacy to *A.* payable at his age of twenty-one, and he dies before, his executors or administrators claiming under such legatee, and standing in his place, shall not be entitled to this legacy until such time as the infant legatee would have attained

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his age of twenty-one, if he had lived; and that this had been solemnly determined as well on an appeal to the House of Lords, 2 *Vern.* 199. as also by the two Chief Justices and the Master of the Rolls upon an appeal to the King in Council from a decree in (*a*) *Antigua*.

(*a*) Ante 337.

But where I devise a legacy of 100*l.* to an infant at his age of twenty-one years, and if the infant dies before twenty-one, then to *J. S.* here *J. S.* does not claim under the infant, but the devise over to him, is as a new substantive bequest, and is

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to be paid on the death of the infant under the age of twenty-one. *Vide* 1 *Anderson* 33. also 2 *Vern.* 283. *Papworth* v. *Moor* express in point.

Wherefore on these authorities *Lord Chancellor* varied the decree which he had before pronounced, and ordered two thirds of this 210*l.* to be paid to the two plaintiffs (the brother and sister of the dead legatee *Whitmore Laundy*) and gave interest for their two thirds from the death of the said infant; for though it was objected that this being a new legacy, the executrix ought to have a year's time for the payment of it, yet the Court held that must be intended to be from the death of the testator; whereas in this case the testator had been dead several years (1).

Note; The rule in equity seems by this resolution to be settled accordingly (2).

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(1) Reg. Lib. B. 1727, fol. 424.

(2) Vide *Harrison* v. *Buckle*, 1 Stra. 238. *Chester* v. *Painter*, ante, 337. *Boycot* v. *Cotton*, 1 Atk. 556. *Roden* v. *Smith*, Amb. 588. *Green* v. *Pigot*, 1 Bro. C. C. 105. (*z*) Sed quære where the legacy is payable out of *land*. *Feltham* v. *Feltham*, ante 271. And where the legacy carries interest, the executor of the deceased legatee shall have the legacy presently. *Fonnereau* v. *Fonnereau*, 1 Vez. 118. (*y*)

(*z*) *Crickett* v. *Dolby*, 3 Ves. 10.

(*y*) But the effect of a direction for maintenance is not equivalent to a gift of the interest. *Pulsford* v. *Hunter*, 3 Bro. C. C. 416. *Hanson* v. *Graham*, 6 Ves. 239.

3. Tu. & Cr. 109.

CASE 152.

ANONYMUS.

At the Rolls. The defendant is in contempt to a serjeant at arms for not answering, and then puts in an insufficient answer. If the plaintiff's clerk in Court accepts the costs, it purges the contempt; but if the costs be not accepted, the plaintiff may go on in his process of contempt where he left off, for a further answer.

IF a man be in contempt to a serjeant at arms for want of an answer, and then puts in an insufficient answer and the clerk in Court accepts the costs of the contempt, this acceptance

ANONYMUS.

does remit and purge the contempt, and in the process of contempt for the second answer, the plaintiff must begin again with an attachment (the first process) and cannot begin where he left off; but if neither the plaintiff nor his clerk in Court does accept the costs of the contempt, for want of the first answer, although tendered, and the first answer be reported insufficient, the plaintiff may go on with the process for the second answer where he left off at obtaining the first; and therefore upon the first answer coming in, it is usual and [482] proper for the plaintiff's clerk in Court to refuse accepting the costs of the contempt for want of the first answer, until he has seen, and advised whether it be a full answer or not, it being a great delay to the justice of the Court, after a first answer is gained and the defendant is at the end of the line as to contempt, and that first answer proves immaterial, to put the plaintiff to begin his process of contempt again as *ab origine* (1).

(1) Sed vide *Child* v. *Brabson*, 2 Vez. 110. (*z*)

(*z*) The practice is settled to be as laid down in the principal case. *Boehm* v. *De Tastet*, 1 V. & B. 324. *Coulson* v. *Graham*, ib. 331. *Hill* v. *Turner*, 2 V. & B. 372. Unless the *plaintiff* has excepted to the Master's report; in which case the defendant is entitled to a subpœna for a better answer. *Agar* v. *Regent's Canal Co.*, Cooper, 221. And the practice is the same where an insufficient examination is put in by a defendant. *Bonus* v. *Flack*, 18 Ves. 287. *Weston* v. *Jay*, 1 Madd. 527. But the defendant cannot be kept in custody pending the reference. *Dupont* v. *Ward*, 1 Dick. 133. *Wallop* v. *Brown*, 4 Bro. C. C. 212, 223. *Bailey* v. *Bailey*, 11 Ves. 151. *Waters* v. *Taylor*, 16 Ves. 417. *Balfour* v. *Farquharson*, 1 S. & S. 72. *Farquharson* v. *Balfour*, 1 Turner, 184. *Anon.* 1 Madd. 109.

5 Sim. 258.
1 Bea. 588.
35 Ch. D. 301.
(94) 3 Ch. 492.

SORRELL *versus* CARPENTER.

CASE 153.

A BILL was brought against the defendant to have the benefit of a decree obtained against one *Ligo*, for the recovery of a leasehold estate held of the dean and chapter of St. *Pauls*.

Lord Chancellor KING.

2 Eq. Ca. Ab. 680. pl. 7.

A purchase pendente lite, though without actual notice, and for a valuable consideration, yet shall be set aside; and though in this case the rule of equity be hard, yet it is in imitation of the common law, where in a real action, if the defendant aliens pending the writ, the judgment will over-reach the alienation: but as it is hard enough in some cases to make people take notice of a decree, it is harder still to oblige them to take notice of a pendency of a suit; and in case of a real purchase pendente lite, the plaintiff is to be held to strict proof. And if any flaw at the hearing be on the plaintiff's side, the Court will not let him amend, but if the purchase pendente lite be fraudulent, and to elude the justice of the Court, it ought to be highly discountenanced.

SORRELL *v.* CARPENTER.

The defendant was a purchaser of this estate *pendente lite* from the defendant *Ligo*, viz. about three months after such time as the bill was filed against the said *Ligo*, and subpœnas served upon him, and he in contempt for not answering; but it was proved in the cause that the defendant was a purchaser for the full value, and without any notice of the plaintiff's title, or any actual notice of the suit.

However it was objected by the Solicitor General, that a purchase made *pendente lite* was to be looked upon as made under an implied and constructive notice, and unless regard should be paid to this, all the decrees and the justice of the
[483] Court might be wholly evaded, since the defendant pending the suit might alien to one, who after the bill should be thereupon amended might alien again, by which means suits and decrees in this Court would be rendered vain.

Lord Chancellor: Where there is a conveyance made *pendente lite*, without any valuable consideration and to avoid and elude a decree, it ought to be highly discountenanced, and even though the alienation be for never so good a consideration, yet if made *pendente lite*, the purchase is to be set aside; and this in imitation of the proceedings in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will over-reach such alienation. But where there is a real and fair purchaser without any notice, it is a very hard case, especially in a court of equity, to set such purchase aside; and there being some defect in part of the proof in deraigning the plaintiff's title, I shall refuse to give the plaintiff leave to amend or make any new proof after publication (1).

Also his Lordship said, it was a difficult matter to search for bills in equity, or to be able to get notice of them, many of such being, after filing, kept in the six clerks desk, and though this Court will oblige all to take notice of its decrees as much as of judgments, yet there does not seem to be the same reason for obliging people to take notice of the filing of a bill (2).

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(1) There appears to have been an order to amend the bill in *Trinity* term 1728. Reg. Lib. B. 1727, fol. 453, and an order of dismissal in the *Mich.* term following, Reg. Lib. B. 1728, fol. 18.

(2) Vide *Crisp* v. *Heath*, 7 Vin. 52. pl. 2. *Garth* v. *Ward*, 2 Atk. 174. *Worsley* v. *Earl of Scarborough*, 3 Atk. 392. (*z*)

(*z*) *Brace* v. *Duchess of Marlborough*, post, 491. *Walker* v. *Smalwood*, Amb. 676. *Bishop of Winton* v. *Paine*, 11 Ves. 194. *Gaskell* v. *Dur-*

Cur: Dismiss the bill, but in regard it is only a slip in proof, let it be without costs. SORRELL *v.* CARPENTER.

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din, 2 Ba. & Be. 167. *Moore* v. *M'Namara*, 2 Ba. & Be. 186. *Gore* v. *Stacpoole*, 1 Dow, 31. *Metcalfe* v. *Pulvertoft*, Sugd. Vendors, 643, (5th edit.) 2 V. & B. 200. *Meux* v. *Maltby*, 2 Swan. 281.

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TERM. S. MICHAELIS, 1728.

JOHN BROME, Esq. and ELIZABETH his Wife } Plaintiffs;

HENRY BERKLEY, Esq.; GEORGE BERKLEY, Esq.; and HENRY COLE, Esq. } Defendants.

CASE 154.

Lord Chancellor KING. and Master of the Rolls.

Upon a marriage settlement lands are limited to the use of the husband and wife for their lives, remainder to their first and every other son in tail, and in default of issue male of the marriage, to trustees in trust to raise 2500*l.* for daughters payable at 21 or marriage, which shall first happen, and out of the profits to pay 100*l.* per annum for maintenance; the first payment of the maintenance to commence after the estate of the trustees shall have come into possession; husband dies without issue male, leaving a daughter, and a wife who is jointured in the premises; the portion shall not be raised in the mother's life-time, because the maintenance, which is naturally to precede the portion, is not to be paid till the trustees are in possession.

BY a marriage settlement dated 29 *February* 1689, lands were settled on *George Berkley* for life without waste, remainder to trustees during his life to preserve contingent remainders, remainder to his intended wife for her jointure, remainder to their first and every other son in tail general successively, remainder to the use of the trustees and their heirs, in trust that if the said *George Berkley* should have no son by the marriage, or if having sons, they should all die before twenty-one, without issue, then * the trustees should out of the rents and profits of the premises, or by sale, or leasing, or otherwise raise for the daughters of this marriage, if but one, 2500*l.* payable at twenty-one or marriage, which should first happen, and should also raise and pay the yearly sum of 100*l.* by half-yearly payments for her maintenance and education, until her said portion should be due, *the first payment of the maintenance-money to be made at such of the half-yearly feasts as should next happen after the said estate so limited to the trus-*

BROME *v.* BERKLEY.

tees as aforesaid should take effect in possession, together with farther provisions if there should be more daughters than one, particularly if more than three, then that the trustees, &c. should stand seised of the premises for the benefit of all and every of the daughters, to be divided amongst them equally as tenants in common, and of their respective heirs and assigns for ever.

The husband died having left no issue male by the marriage, and but one daughter, who being twenty-one, brought this bill in the life-time of her mother (who had her jointure on the premises) against the trustees for the raising of this portion by sale or mortgage of their reversionary trust-estate, and also with interest from the time the same became payable; insisting,

1*st*, That the words of the settlement were plain and positive as to this particular of raising the portion of 2500*l.* in case of failure of issue male of the marriage, for an only daughter, which *was to be paid to her at the age of twenty-one or marriage*, without restraining it from being done till after the death of the mother. 2*dly*, For that it was highly reasonable this provision in the settlement should have a favourable construction, because the plaintiff *Elizabeth* (who was the only
[486] issue of the marriage) claimed as a purchaser for a valuable consideration, the consideration of marriage, and a portion paid; whereas the defendants claimed only under a voluntary disposition, and subject to the portion. 3*dly*, Forasmuch as, had there been more than three daughters, the whole reversion in fee of the premises would have vested in those daughters to be at their disposal, in which case if the plaintiff *Elizabeth* had had three sisters, she would have had the fourth part of the reversion in her immediate disposal, though in her mother's lifetime; whereas though she was now the sole issue of the marriage, yet unless she succeeded in this suit, she could have no provision during her mother's life.

(*a*) 10th May 1727.

This case came on some terms since (*a*), but was adjourned in order to be considered by the *Lord Chancellor* and *Master of the Rolls*; and now it received a solemn determination by them, who delivered their opinion *seriatim*.

Master of the Rolls: This portion ought not be raised until the jointress's death; I admit that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless in the declaration of the trust of the term the intention of the parties appears to the contrary. Thus in the case of *Sandys* versus

Sandys (*a*) there was a term created for portions, which was to commence in possession after the death of the father and mother, but the portions being payable at a certain time, at the daughters' ages of twenty-one or marriage (if after fourteen) and nothing appearing in the trust of the term, which shewed it to be the intent of the parties that the portion should not be raised out of the reversionary term, the portion was decreed (though *reluctante curiâ*) to be raised in the father's lifetime. In the case of (*b*) *Corbet* versus *Maidwell*, where all the cases of this nature which had been then adjudged were cited, Lord *Cowper* took notice, that if those of *Gerrard* versus *Gerrard*, *Staniforth* versus *Staniforth*, and *Greaves* versus *Maddison*, had come before him for judgment, he would hardly have gone so far; and indeed the case of † *Greaves* versus *Maddison* has not been warranted by any before or since. But this case is quite open, even as much as if no resolution had ever been in relation to the matter now in question. Here all the contingencies have not happened, since the estates for life must all determine before the portion can or ought to be raised. And greater inconveniences would arise to families by the sale of these reversionary estates or terms, than can possibly be occasioned by the daughters staying for their portions; by such sales or mortgages of reversions, families are often ruined, and the daughters also themselves undone by improvident marriages; and though inconveniences ought not to weigh where the words are plain and positive, yet if arguments from the conveniency of daughters being paid their portions out of reversionary estates at a time when they may most want them, have hitherto had too great a weight (as I think they have) it is time to put an end to them.

(*a*) Vol. 1. 707.

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(*b*) Salk. 159.

I agree, the intention as to the manner of raising the portion ought to prevail, and here such intention is plain; for in this case the maintenance for the daughter is not to be paid until the trust-estate comes into possession, and the payment of the maintenance must be intended to (*c*) precede the payment of the portion; the maintenance must determine when the portion becomes payable; and this is the plainest indication imaginable, that the parties intended the portions should not be paid until the trust-estate came into possession, which makes this case full as strong as that of *Butler* versus *Duncombe*. (*d*)

(*c*) Vide Salk. in the case of Corbet v. Maidwell, ubi supra.

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(*d*) 1 vol. 448. 2 Vern. 760.

† Vide the case of *Reresby* v. *Newland*, ante, 99, where Lord *Macclesfield* said this case was not reconcilable to common sense.

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Lord Chancellor: I am of the same opinion: all men's deeds are to be taken according to their intention, and where the words are plain, the conveniences and inconveniences which may ensue from thence are not to be regarded. It seems to me, that the Court has gone rather too far in sales of reversions for raising portions for daughters, even against the intention of settlements, and though I would not undo what has been done, yet most certainly I will go no farther; and I take it, that the case now before the Court stands clear of all the former resolutions. Here the maintenance for the daughters is to be raised out of the rents and profits, after such time as the *trust-estate chargeable with the portion is come into possession;* and it is absurd to say, that the portion shall be raised first, and the maintenance-money paid afterwards. Besides, the argument which has in some cases been allowed too much weight, that the portion ought to be raised to advance the daughter in marriage, cannot be used here; the plaintiff *Elizabeth* having been married many years ago, and having a considerable provision over and above what is now contended for.

Wherefore the bill, which she has now brought for her portion in her mother the jointress's life-time, comes too soon, and ought to be dismissed (1).

This decree was affirmed by the Lords on an appeal in the *March* following (2).

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(1) Vide *Butler* v. *Duncombe*, ante, 1 vol. 448.

(2) 3 Bro. P. C. 437.

2. Tu. Ca. 698.

2. Tu. Hee. 200.

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CASE 155.

PAGE *versus* PAGE.

Lord Chancellor KING.

Mos. 42.
2 Stra. 820.
One devises the surplus of his personal estate to six persons, to each a sixth part, one of them dies in the life of the testator; this sixth part shall be taken as undisposed of by the will, and go to the testator's next of kin.

ONE devised the residue of his personal estate to six persons, *to each of them a sixth part*, and made them executors, but one of these six executors and residuary legatees died in the life-time of the testator.

Lord Chancellor: This is a lapsed legacy as to one-sixth, and undisposed of by the will, the residuary legatees being tenants in common and not jointenants; and therefore the legacy shall

not survive, but go to the testator's next of kin, according to the statute of distribution (1). PAGE v. PAGE.

Note; This case in *August* 29, 1734, was cited before Lord *Talbot*, who said that it was plainly right, for that none of the other residuary legatees could have any more than a sixth part each, so that the sixth part of the residuary legatee who died in the life of the testator, must go as undisposed of to the next of kin; but if any legatee, where there is a joint devise, dies in the life of the testator, it shall go to the surviving legatees, which could not be in the present case, forasmuch as each residuary legatee was to have no more than one sixth part (2).

(1) Reg. Lib. B. 1728. fo. 80. 1 vol. 700. *Hunt* v. *Berkeley*, Mos.
(2) Vide *Bagwell* v. *Dry*, ante, 47 (*z*).

(*z*) *Androvin* v. *Poilblanc*, 3 Atk. 299. *Bennet* v. *Batchelor*, 1 Ves. jun. 67. 3 Bro. C. C. 28.

1 Young & C. 356.
(93) 3 Ch. 15. TOLLET *versus* TOLLET. CASE 156.

THE husband by virtue of a settlement made upon him by an ancestor, was tenant for life*, with remainder to his first, &c. son in tail male, with a power to the husband to make a jointure on his wife *by deed under his hand and seal.* Master of the Rolls. Mos. 46. 2 Eq. Ca. Ab. 233. pl. 16. 663. pl. 10.

Husband has a power to make a jointure to his wife by deed; he does it by will, and she has no other provision; equity will make this good.

The husband having a wife, for whom he had made no provision, and being in the *Isle of Man*, by his last *will under his hand and seal*, devised part of his lands within his power to his wife for her life. [* 490]

Object. This conveyance being by a *will* is not warranted by the power which directs that it should be by *deed*, and a will is a voluntary conveyance, and therefore not to be aided in a court of equity.

Master of the Rolls: This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for; and as a court of equity would, had this been the case of a copyhold devised, have supplied (1) the want of a surrender, so where there is a defective execution of the power, be it either for payment of debts or provision for children; so also will it help a defective execution of a power; secus of a non-execution. Equity will supply the want of a surrender of a copyhold, in case it be devised for payment of debts, or for a wife, or for younger

(1) *Watts* v. *Bullas*, ante, 1 vol. 60.

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a wife, or children unprovided for, I shall equally (1) supply any defect of this nature: the difference is betwixt a *non-execution* and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this Court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself (*y*).

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And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will (2).

(1) *Cotter* v. *Layer*, post 625. *Carter* v. *Carter*, Mos. 365. *Hervey* v. *Hervey*, 1 Atk. 563. *Sergeson* v. *Sealy*, 2 Atk. 415. *Sneed* v. *Sneed*, Amb. 64. *Earl of Darlington* v. *Pulteney*, Cowp. 266. *Wade* v. *Paget*, 1 Bro. C. C. 363. *Mac Adam* v. *Logan*, 3 Bro. C. C. 310 (*z*). In *Chapman* v. *Gibson*, 3 Bro. C. C. 229, the Court held, that defects in the execution of powers were supplied upon the same grounds, and in the same cases, as defects in the surrender of copyholds; as to which vide *Watts* v. *Bullas*, ante 1 vol. 60.

(2) Reg. Lib. B. 1728. fol. 489.

(*z*) *Wilkes* v. *Holmes*, 9 Mod. 485. 1 Dick. 165. *Jackson* v. *Jackson*, 4 Bro. C. C. 462. *Shannon* v. *Bradstreet*, 1 Sch. & L. 52. *Wykham* v. *Wykham*, 18 Ves. 415. *Blake* v. *Marnell*, 2 Ba. & Be. 35, 4 Dow, 248. Contra, in case of a natural child, *Bramhall* v. *Hall*, Amb. 467, 2 Eden, 220; or of a husband, *Moodie* v. *Reid*, 1 Madd. 516.

(*y*) So *Coventry* v. *Coventry*, ante 227. *Tomkin* v. *Sandys*, ib. not. *Harrington* v. *Harte*, 1 Cox, 131. *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206. *Reid* v. *Shergold*, 10 Ves. 370. Unless the power is in the nature of a trust. *Harding* v. *Glyn*, 1 Atk. 469. *Peirson* v. *Garnett*, 2 Bro. C. C. 38, 226. *Crossling* v. *Crossling*, 2 Cox, 396. *Brown* v. *Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561. 18 Ves. 192. *Cruwys* v. *Colman*, 9 Ves. 319. *Gower* v. *Eyre*, Cooper, 156.

1 Ch. Ca. 232. 1. Hare. 563. 1. Ad. & El. 934. Followed 7 R. J. 74). 1. Ch. 36.

CASE 157.

BRACE *versus* DUCHESS OF MARLBOROUGH.

Master of the Rolls.

Mos. 50. 2 Eq. Ca. Ab. 613. pl. 5, &c.

AFTER a decree which referred it to a Master to state the several incumbrances and their priority, affecting the estate of Sir *William Gostwick*, this case (1) arose: A puisne judgment creditor bought in the first mortgage without notice of the

(1) Reg. Lib. A. 1728. fol. 124.

second mortgage when he lent his money on the judgment, and the question was, whether this puisne judgment creditor should tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne mortgage? And the *Master of the Rolls* on considering the cases and precedents, held

BRACE *v.* Duchess of MARLBOROUGH.

1*st*, That if a third mortgagee buys in the first mortgage, though it be *pendente* (1) *lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice *Hale* called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*.

Third mortgagee buys in the first, though pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee shall tack the first mortgage to his third mortgage.

2*dly*, If a judgment creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c. and thereby gain a preference; for one cannot call a judgment, &c. creditor, a purchaser, nor has such creditor any right to the land; he has neither *jus in re*, * nor *ad rem*, and therefore, though he releases all his right *to the land* he may extend it afterwards. All that he has by the judgment is a lien upon the land, but *non constat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the

If a creditor by judgment, statute, or recognizance buys in the first mortgage, he shall not tack it to his judgment, &c. because he did not lend his money on the credit of the land, has no present right therein, nor can be called a purchaser.

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(1) *Hawkins* v. *Taylor*, 2 Vern. 29. *Turner* v. *Richmond*, 2 Vern. 81. *Belchier* v. *Renforth*, 6 Bro. P. C. 28 (*z*). *Robinson* v. *Davison*, 1 Bro. C. C. 63, (*y*) but after a decree and direction to settle priorities, a party in the cause shall not have the advantage of tacking his puisne incumbrance to a prior one taken in since the decree. *Wortley* v. *Birkhead*, 2 Vez. 571 (*x*).

(*z*) S. C. 1 Eden, 523.

(*y*) In *Mackreth* v. *Symmons*, 15 Ves. 335, Lord *Eldon* is made to say, "Is there any case where a third mortgagee has excluded the second, if the first mortgagee when he conveyed to the third knew of the second? When the case of *Maundrell* v. *Maundrell*, (10 Ves. 246,) was before me, I looked for, but could not find such a case." Now *Belchier* v. *Renforth*, and *Robinson* v. *Davison*, ub. sup. are both such cases; it seems therefore that the Chancellor's question must have been intended to apply only to cases where the *first mortgage was satisfied*, and so the first mortgagee had become a trustee for the person entitled to the inheritance, before the conveyance to the third mortgagee. See *Ex parte Knott*, 11 Ves. 609.

(*x*) But a commission of bankrupt has not the same effect as a decree. *Ex parte Knott*, 11 Ves. 609.

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body, and then during the defendant's life he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased may be extended on the judgment, nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate, whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another; and it is such a fraud as the (*a*) parliament takes notice of, and punishes by foreclosing such mortgagor who mortgages his land a second time, without giving notice of the first mortgage, and in that respect this case differs from a puisne mortgagee's buying in the first mortgage.

(*a*) See 4 & 5 W. & M. c. 16.

3*dly*, Though the rule of equity has been so settled, it is not however without great appearance of hardship; for still it seems reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know when he lent his money, that the land was of sufficient value to pay the first mortgage, and also his own; to be defeated of a just debt, by a matter *inter alios acta*, a contrivance betwixt the first mortgagee and the third, is great severity; but this has been settled upon solemn debate in a case in 2 *Vent.* 337. *Marsh* versus *Lee*, wherein that great man Sir *Matthew Hale* (then Chief Baron) was called by the Lord Chancellor to his assistance; though this be settled, there can be no reason to carry it farther, to a case not within the same reason, to a case where the lender of the money does not advance it upon the immediate credit of the land; no precedents go so far, being all of them where a puisne mortgagee buys in a first mortgage, not where a puisne creditor by judgment, statute, or recognizance does so, as appears from the case cited of *Marsh* versus *Lee*, reported also in 1 *Chan. Cases* 162. So in 1 *Chan. Cases* 149. *Higgon & al'* versus *Syddal*, *Callamy & al'*, where *Syddal* seised in fee of land, granted a rent-charge of 300*l.* per annum for 2000*l.* to the plaintiff, and afterwards mortgaged the premises for 1200*l.* to *Callamy*, who bought in a judgment precedent to the grant of the rent-charge, there the mortgagee of the land having no notice of the rent-charge, when he lent his money upon the mortgage, the grantee of the rent-charge was decreed to have no remedy in equity against the judgment, unless he would pay both the mortgage and the judgment; though it is to be observed in that case, the judgment creditor, who was the first in-

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cumbrancer, could at law extend but a moiety, and out of the remaining moiety the grantee of the rent-charge might distrain for the whole rent; but it seems, that if the first incumbrance had been a statute-staple, and the third mortgagee had bought it in, he should have had the whole land, until at law the cognizor of the statute by a *scire facias ad computandum* had got the statute vacated, and that could only be on payment of the penalty; for equity would not in such case have given any assistance against a third mortgagee without notice, until he was paid his mortgage as well as statute. So note a diversity (1) where a third mortgagee buys in a statute which is the first incumbrance, and where a statute creditor, &c. being the * third incumbrancer buys in the first mortgage; in the latter case the statute or judgment creditor, because he did not lend his money on the credit of the land, shall not unite the first mortgage to his statute or judgment; but in the former, as the land was in the view and contemplation of the lender, he shall be allowed to unite the statute to his third mortgage. So in 1 *Vern.* 187, *Edmunds* versus *Povey*, there was a first, second and third mortgage without notice, and the third mortgagee bought in a judgment prior indeed to all, but it was satisfied, and the first mortgagee bringing his bill to be relieved against this judgment, Lord Keeper *North* would not allow it to be so much as debated, but took it to be settled in the above cited case of *Marsh* versus *Lee*, and not then to be disputed; though his Lordship admitted that it was at first a very disputable case, and very strong arguments and reasons had been urged on the other side.

If a puisne mortgagee buys in a judgment or statute, being the first incumbrance, he shall hold till by law he can be evicted.

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4thly, If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage, and statute, or judgment be paid; because it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and in confidence ventured

The first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against mesne mortgagees till the statute or judgment is paid.

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(1) So, *Morret* v. *Paske*, 2 Atk. 53. Cha. 494. and Gilb. Rep. 150. S. C. Vide tamen *Wright* v. *Pilling*, Pre. *Anon.* 2 Vez. 662 (*z*).

(*z*) The name of this case is *Jackson* v. *Langford*. Belt's Supplement, p. 436.

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a farther sum on a security, which though it passed no present interest in the land, yet must be admitted to be a lien thereon(1).

If a puisne mortgagee buys in a prior judgment extended on an elegit at an under value he shall hold the extent till evicted at law.

5thly, If a puisne mortgagee without notice buys in a prior judgment or statute, and that judgment, &c. be extended upon an *elegit* at a value much under the real, the mesne mortgagee shall not make the puisne mortgagee, who has got in this judgment, account otherwise, or for more than the extended value; nor * will this Court give any relief against the judgment or statute, but leave the mesne mortgagee to get rid of them as well as he can at law.

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But in all these cases there must not be notice of the mesne incumbrance when the money is lent.

But, *6thly*, his Honour said, in all these cases it must be intended, that the puisne mortgagee, when he lent his money, had no notice of the second mortgage, statute or judgment, for that was the sole equity; and therefore in the principal case where the creditor by recognizance who bought in the first mortgage, did not in his answer deny notice, though such notice was not charged in the bill (which was here brought by some puisne incumbrancers for a sale, and upon bill and answers first a decree to state the several incumbrances, then a report, and thereupon a farther decree was obtained for the Master to state the value of the land mortgaged to each of the mortgagees) yet after all these proceedings for a puisne judgment, &c. creditor, to insist upon his having had no notice, and offering to be examined upon interrogatories was not sufficient; but this denying of notice ought to appear on the pleadings, whereupon the parties might go to issue, and have an opportunity of proving notice; and therefore though it were true that a puisne judgment creditor buying in a first mortgage, should in such case unite it to the judgment, (which was clearly otherwise) yet here the puisne judgment creditor came too late, it being a case not to be favoured, and in a cause very much entangled, which, if such indulgences were to be given to the puisne judgment creditor, would never have an end.

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(1) *Shepherd* v. *Titley*, 2 Atk. 352. *Anon.* 2 Vez. 662 (*z*). But in *Lowthian* v. *Hasell*, 3 Bro. C. C. 162. it was determined that a mortgagee, who had advanced a further sum of money to the mortgagor on bond, should not tack his bond debt to his mortgage as against other specialty creditors (*y*).

(*z*) *Baker* v. *Harris*, 16 Ves. 397. *Secus*, if the land mortgaged be copyhold. *Heir of Cannon* v. *Pack*, Vin. Ab. Copyhold, (O. e.) pl. 6. Nor can a first mortgagee tack a judgment subsequent to the second mortgage, which he has purchased without the consent of the mortgagor; *Breerton* v. *Jones*, 1 Eq. Ca. Abr. 326.

(*y*) See *Coleman* v. *Winch*, ante, vol. 1. p. 775.

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7thly, In this case it appeared that a puisne incumbrancer bought in a prior mortgage, in order to unite the same to the puisne incumbrance, but it being proved * that there was a mortgage prior to that, the Court clearly held that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time; *qui prior est in tempore, potior est in jure* (1) (*z*).

If a puisne incumbrancer buys in a prior mortgage, and the legal title be in a trustee or in any third person, then the buying in such first mortgage will not avail, but in all such cases where the legal estate is standing out the incumbrances must be paid according to their priority.

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(1) Vide *Clarke* v. *Abbott*, Barnard. 457. *Morret* v. *Paske*, 2 Atk. 52. *Mathews* v. *Cartwright*, 2 Atk. 347. *Earl of Pomfret* v. *Lord Windsor*, 2 Vez. 486. *Wortley* v. *Birkhead*, 2 Vez. 571. and 3 Atk. 809. S. C. *Belchier* v. *Renforth*, 6 Bro. P. C. 28 (*y*). *Robinson* v. *Davison*, 1 Bro. C. C. 63. *Willoughby* v. *Willoughby*, 1 T. R. 763 (*x*).

(*z*) Note also, that securities cannot be tacked, unless both are held in the same right. *Barnett* v. *Weston*, 12 Ves. 130.

(*y*) S. C. 1 Eden, 523.

(*x*) *Maundrell* v. *Maundrell*, 10 Ves. 246. *Frere* v. *Moore*, 8 Price, 475. *Parry* v. *Wright*, 1 S. & S. 369.

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CASE 158.

Lord Chancellor KING.

Baron and feme bring a bill to redeem a mortgage, defendants plead to the bill, and the plea overruled, and costs given to the plaintiffs, which by the course of the Court are 5*l*. Baron dies, the feme by survivorship shall have the costs.

THE plaintiff and his wife brought their bill to redeem a mortgage of the wife's estate; the defendant put in a plea to the bill, which was over-ruled, for which 5*l*. costs is of course given to the plaintiff; the defendant brought a cross bill to foreclose the wife, who being the surviving plaintiff in the original cause, moved the Court that proceedings should stay in the cross cause, until the plaintiff, who was defendant in the original cause, had paid the 5*l*. costs due upon overruling the plea.

Object. These costs must be intended to have been laid out by the husband in the original cause, and consequently upon his death the same were lost.

On the other side it was insisted, that this original suit was in right of the wife, who being entitled to the equity of redemption, the husband joined therein only for conformity; that the suit was not abated by the death of the husband, the

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order for costs being in nature of a joint judgment which must survive to the wife; and the sum for costs was certain by the course of the Court, though not expressed in the order.

Lord Chancellor for some time doubted, and asked the register; but afterwards taking it to be as a joint judgment for a sum certain, determined that it did survive (1) to the wife; and they who opposed the motion, saying that a bond given to the husband and wife during the coverture, on the husband's dying first, did not survive to the wife: Lord Chancellor denied this, *& rectè*, for (*a*) clearly it does survive to the wife, as all other joint *choses in action* do (*z*); though it is true in this case the husband may disagree to the wife's right to it, and bring the action on the bond in his own name only; but till such disagreement, the right to the bond is in both the husband and the wife, and shall survive.

Bond given to a baron and feme during the coverture, baron dies, the bond will survive to the wife.
(*a*) Allen 36.

Whereupon it was ordered that the proceedings should stay in the cross cause until the defendant in the original cause pay the 5*l.* costs for over-ruling his plea.

(1) Vide *Bond* v. *Simmons*, 3 Atk. 21. *Anon.* 3 Atk. 726.

(*z*) *Wildman* v. *Wildman*, 9 Ves. 174. *Philliskirk* v. *Pluckwell*, 2 M. & S. 393. *Nash* v. *Nash*, 2 Madd. 133.

CASE 159.

Ex parte CASWELL, *ex parte* CAZALET, *ex parte* BATEMAN.

Lord Chancellor KING.

Mos. 28, 79.

THESE three cases were reserved for the opinion of the *Lord Chancellor*, who had taken time to consider thereof. The cases were, an husband trader in consideration of marriage, and of a portion, gave a bond to his wife's trustee to leave the wife, if she survived him, 1000*l.* the obligor became * a bankrupt; and it was objected, that in Lord (*a*) *Cowper*'s time it had been ordered in case of a bond given on so valuable a consideration, that the money computed upon the distribution to be the share of the obligee in this bond, should be put out at interest, and the creditors to have such interest during the life of the husband

A trader on marriage gives a bond to a trustee to secure 1000*l.* to the wife if she survived him; the trader becomes a bankrupt; this debt not to be allowed, nor any reservation to be made for it, nor shall it stop the distribution, in regard it may never be a debt; so within the same reason an obligee on a bottomry bond shall not, before the return of the ship, come in under the commission of bankruptcy; but in either of these cases, if the contingency happens before the bankrupt's estate be fully distributed, such creditor shall come in.

(*a*) 2 Vern. 662. Holland v. Culliford.

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Ex parte CASWELL.

the bankrupt, and if the husband should die, living the wife, the money to be paid to the wife; but if the wife should die in the life-time of her husband, then the money to be paid to the creditors.

On the other hand Lord (*a*) *Macclesfield* was said to have doubted of this; wherefore these cases coming now in question before the present Chancellor, his Lordship ordered the precedents made in Lord *Cowper*'s time to be left with him; and accordingly one or two of those precedents were left with him.

(*a*) On a petition ex parte Bayly, in Hill. Vac. 1720.

But his Lordship was of another opinion, conceiving that no part of the bankrupt's estate should wait or be deferred from being distributed, the act ordering that the bankrupt's estate should be distributed within —— months; especially that the distribution should not wait, as in the present case, for a debt which was neither *debitum in præsenti*, and never might be *debitum in futuro*, in regard the wife might die in the life of the husband; besides the husband, after his certificate allowed, might go to his trade again, and become a solvent person, able to pay off his bond, and therefore in all these cases, the Court resolved, that the contingent creditor should not come in for a distribution, neither should the money be reserved in favour of such contingency (1); but his Lordship declared,

(1) *Tully* v. *Sparks*, Ld. Raym. 1546. *Ex parte Jeffries*, 7 Vin. 72. pl. 7. *Ex parte King*, Dav. 254. *Hancock* v. *Entwistle*, 3 T. R. 435 (*z*). *Secus*, where the provision is secured by a judgment or a bond forfeited at law before the bankruptcy. *Ex parte Groome*, 1 Atk. 115. *Ex parte Winchester*, 1 Atk. 116. *Ex parte Mitchell*, 1 Atk. 120. *Ex parte Greenaway*, 1 Atk. 113. *Goddard* v. *Vanderheyden*, 3 Wils. 271 (*y*). *Hancock* v. *Entwistle*, 3 T. R. 435 (*x*). Where the contingency, upon which the money is made payable, is the *bankruptcy or insolvency of the debtor*, such debt cannot be proved under his commission. *Ex parte Hill*, Cooke's Bank. Laws. 238(*w*).

(*z*) But now by stat. 6. G. 4. c. 16. s. 56, a creditor in respect of a debt payable upon a contingency which has not happened before the issuing of the commission may have the debt valued by the commissioners, and prove such value, and receive dividends thereon; or if the value is not ascertained before the contingency happens, then the creditor may, after the contingency has happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends.

(*y*) S. C. 2 B. & P. 8. (Note.)

(*x*) And see Mr. Eden's Note to *Ex parte Jacob*, 1 Eden, 176.

(*w*) S. C. 1 Cox, 300. *Ex parte Bennet*, Cooke, B. L. 240. Except in cases of marriage settlements, &c. where the money made payable upon such contingency was originally the property of the bankrupt's wife. *Lockyer* v. *Savage*, Str. 947. *Ex parte Cooke*, 8 Ves. 353. *Re Murphy*, 1 Sch. & L. 44. *Re Meaghan*, ib. 179. *Ex parte Hinton*, 14 Ves. 598. *Ex parte Hodgson*, 19 Ves. 206. *Ex parte Young*, Buck, 179, 3 Madd. 124. *Ex parte Taaffe*, 1 G. & J. 110. And see *Ex parte Elder*, 2 Madd. 282. *Ex parte Oxley*, *Ex parte Verner*, 1 Ba. & Be. 257, 260.

Ex parte CASWELL.

That though the debt were contingent when the obligor became a bankrupt, yet if the contingency happened before the distribution made, then such contingent creditor should come in for his debt; so if such contingency happened before the second dividend made, the creditor should come in for his proportion thereof, though after the first dividend (1).

2*dly*, One of these cases was of a bottomry bond, and the obligor thereof became a bankrupt before the return of the ship, and the ship did not return before the distribution made; whereupon it was held, that such obligee (2) should have no benefit of the distribution upon the commission: And

Also such contingent creditor shall not be barred by the allowance of the bankrupt's certificate, because the right of action was not then accrued.

Whereas it was objected, that this bond would be barred after the bankrupt's certificate allowed, which could not be, unless it were to be looked upon as then due:

But note the cautious way of declaring in such case.

Per Cur': This cannot be, if the obligee is careful in declaring upon his bond; indeed if the party declares upon the bond only, he shall be barred: *secus*, if he sets forth as well the condition as the bond in the declaration, for then it must appear that the cause of action did not accrue at the time of the obligor's becoming a bankrupt (3).

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(1) Sed contrà, *Ex parte Groome*, 1 Atk. 118.

(2) But the case of an obligee in a *bottomree* or *respondentia* bond is now particularly provided for by stat. 19. Geo. 2. c. 32. s. 2 (*z*).

(3) Sed vide *Alsop* v. *Price*, 1 Doug. 160, 3d. edit.

(*z*) The stat. 6. G. 4, c. 16, s. 53, continues this provision.

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CASE 160.

Ex parte COOK.

Lord Chancellor KING. Mos. 80.

Two joint traders becoming bankrupts, first there is a joint commission taken out and commissioners assign, afterwards separate commissions and assignments made under them; the Court held, that the assignment of the commissioners under the first commission conveyed away all the bankrupts' estate both joint and several, and consequently that the conveyance under the separate commission was void.

Two joint traders became bankrupt, and a joint commission of bankruptcy is taken out against them, upon which the commissioners make an assignment of the real and personal estate of the two bankrupts, or either of them; afterwards the separate creditors take out separate commissions against these two bankrupts, and the commissioners on the separate commission assign over the separate effects and estate to other assignees; and now the assignees under the separate commissions, applied

Ex parte Cook.

by petition to the Court, that they might be at liberty to sue at law for the separate estate.

Lord Chancellor: It seems to me, that the assignment made by the commissioners upon the joint commission, passes as well the separate as the joint estate of the two partners the bankrupts, consequently the assignees on the separate commissions can make nothing of their action at law, and I will not suffer them to spend and waste the estate in vexatious suits there; but if they will join in a bill in equity for an account of the separate estate, I will not hinder them (1).

It is (*a*) settled, and is a resolution of convenience, that the joint creditors shall be first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner, and if there be a surplus of the joint estate, besides what will pay the joint creditors, the same shall be applied to pay the separate creditors, and if there be on the other hand a surplus of the separate estate, beyond what will satisfy the separate creditors, it shall go to supply any deficiency that may remain as to the joint creditors. But in this case, for the ease of both parties, let it be referred to a commissioner in each of these commissions, to take an account of the whole partnership effects, and also of the separate effects and estates of each of the partners; and if the commissioners find any thing difficult, they are to be at liberty to state it specially; and with regard to the surplus of the partnership effects, beyond what will pay the partnership debts, and also touching the surplus of the separate effects, if there shall remain any, over and above what will pay the separate debts, each side to be at liberty to apply to the court concerning any of the said surplusses (2).

(*a*) 2 Vern. 706. Ex parte Crowder.

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It is a resolution of convenience, that in case of joint traders becoming bankrupts, the joint creditors shall be first paid out of the partnership effects, and the separate creditors out of the separate effects. And if any surplus of the partnership effects, after all the partnership debts paid, the separate creditors to come in, and so vice versa the partnership creditors to come in on a surplus of the separate estate.

(1) In fact joint commissions do frequently issue after a separate commission has issued against one of the parties, but upon recent application to the Great Seal, the Court will supersede the separate commission, in order to give validity to the joint commission, under which both sets of creditors may have their proper relief in the manner abovementioned. *Ex parte Hardcastle*, 1 Cooke's Bank. Laws 3 (*z*), and many other cases (*y*).

(2) *Twiss* v. *Massey*, 1 Atk. 67. *Ex parte Baudier*, 1 Atk. 98. *In matter of Simpsons*, 1 Atk. 138, &c. (*x*).

(*z*) S. C. 1 Cox, 397.

(*y*) *Ex parte Martin*, 15 Ves. 114. *Ex parte Crew*, 16 Ves. 236. *Ex parte Brown*, 1 V. & B. 60. 1 Rose, 433. *Ex parte Rawson*, 1 V. & B. 160. 1 Rose, 423. *Ex parte Cridland*, 3 V. & B. 94. 2 Rose, 164. *Ex parte Pachelor*, 2 Rose, 26.

(*x*) See *Horsey's case*, post 3 vol. 23. *Ex parte Rowlandson*, ib. 405.

CASE 161.

HAY *versus* PALMER.

On a Petition at the Rolls.

2 Eq. Ca. Ab. 83. pl. 3. 646. pl. 22.

By a marriage-settlement maintenance for daughters is made payable half-yearly, at Lady-day and Michaelmas, until the portions become payable, which was at eighteen or marriage; a daughter attained her age of eighteen the 16th of August; decreed to have her age of 18.

ON the marriage of Sir *Thomas Palmer*, the petitioner's father, with *Elizabeth Marshall* in *Nov.* 1700, a settlement was made, by which, upon the death of Sir *Thomas Palmer* without issue male, a term of 500 years was limited in trust to raise portions for daughters, 6000*l.* if one daughter, 8000*l.* if two or more, equally to be divided between them, and for their maintenances, 100*l.* per annum if but one, 80*l.* a-piece per annum if two, 70*l.* per annum a-piece if three, or more, to be paid by half-yearly payments at *Lady-day* and *Michaelmas*, and to continue until the portions should become payable respectively; the portions and maintenances to be raised out of the rents * and profits, or by sale, mortgage, or lease of the premises, and the portions to become payable at their respective ages of eighteen or marriage, which should first happen. The 9th of *November* Sir *Thomas Palmer* died leaving issue of the marriage three daughters only.

her maintenance pro rata from the last Lady-day to the time of her attaining

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On a bill to take an account of the estate, and to have the direction of the Court, &c. a decree was made directing (*inter al'*) that the maintenance should be paid according to the settlement.

16 *Aug.* 1727, *Elizabeth* the eldest daughter attained her age of eighteen, and her maintenance had been paid till *Lady-day* 1727, but because the full half year was not due from that time till her age of eighteen, (she having come of age before *Michaelmas*) it was doubted whether she was entitled to any maintenance from *Lady-day* to the 16th of *August;* the settlement being, that the maintenance should be paid by half-yearly payments, at *Lady-day* and *Michaelmas*, she therefore now petitioned to have her maintenance paid from *Lady-day* to the 16th of *August.*

Master of the Rolls: This case is not like the case of rent, which will not be payable till the last moment of the day, on which it is expressly reserved in the lease; as suppose a tenant for life makes a lease for years, and dies the day before the rent is due, the rent is lost both to the executor and the reversioner, and the law being so, (*a*) equity will not relieve, though it seems a hard case; and which (perhaps) has the greater reason for relief, because the tenant has enjoyed the land out of which the rent issues. The present case is of a sum to be received for maintenance, which is always favoured, being for

(*a*) See the case of Jenner versus Morgan, vol. 1. 392. and the late statute there referred to.

the daily subsistence of the children: it is not like interest, because that is only for delay of payment of what is due; but here the portion is not due till eighteen or marriage, and therefore no delay. But perhaps it is a stronger case than that of interest reserved exactly in the same words, under the same restrictions at certain days and by half-yearly payments, because this maintenance is for the daily support of the infant. In the present case, the deed is in this respect penned very imperfectly, for want of a proper sagacity in the drawer, to foresee the several cases which might happen. However, the general intention is clear, that maintenance should be paid during the whole interval of time, from the commencement of the term, till the portion should become due; indeed the manner of wording this clause cannot be exactly satisfied by any construction; but that which comes nearest to the sense, and best answers the general intention is, that the maintenance shall be paid half-yearly, at *Michaelmas* and *Lady-day*, in every instance where it can happen, during the time from the commencement of the term, till the portions become payable, and where that cannot be, it is a case out of the direct provision of the settlement as to the time of payment, but within the general provision of the maintenance itself, which is expressed to continue till the portions become payable, and that must be entirely rejected, if nothing be payable for the time from *Lady-day* to the 16th of *August*, when the portion became due; wherefore maintenance ought to be paid during such interval of time in proportion, which I order accordingly (*z*).

See also *ante* 176. *Edwards* versus *The Countess of Warwick*, where the Court apportioned interest on a mortgage (1).

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(1) So, *Wilson* v. *Harman*, 2 Vez. 672. *Sherrard* v. *Sherrard*, 3 Atk. 502; but it seems that this cannot be properly called an apportionment, since interest is in fact *due* on a mortgage *from day to day* (*y*). But the dividends on the public funds being made payable on certain days, are not to be apportioned. *Sherrard* v. *Sherrard*, and *Wilson* v. *Harman*, ub. sup. *Pearly* v. *Smith*, 3 Atk. 260, although in the two first of those cases the money had been directed to be laid out in land, and until the purchase, to be invested in the public funds, and the dividends to go in the same way the rents and profits would, if the purchase were made: and in the latter case, the money had been originally secured by mortgage, but by order of the Court had been transferred to government securities.

(*z*) So, though an annuity is not generally apportionable, an annuity settled by a husband on his wife for her separate maintenance has been apportioned. *Howell* v. *Hanforth*, 2 Black. Rep. 1016. *Anderson* v. *Dwyer*, 1 Sch. & L. 301. And see *Webb* v. *Lord Shaftsbury*, 11 Ves. 361. *Franks* v. *Noble*, 12 Ves. 484, and Note to *Ex parte Smyth*, 1 Swan. 337.

(*y*) So on a bond; *Banner* v. *Lowe*, 13 Ves. 135.

TERM. S. HILLARII, 1728.

CASE 162.

TAYLOR *versus* JOHNSON.

At the Rolls.

Mos. 98. 2 Eq. Ca. Ab. 566. pl. 16. A. by will devises 500*l.* to his infant grandson without appointing any time for payment, with proviso, that if the grandson dies before twenty-one, then the legacy to go over to B. the grandson shall have the interest of the legacy during his infancy.

A MAN by will devised 500*l.* to his infant grandson, without mentioning any time of payment, with a proviso, that if the grandson should die before twenty-one, then the legacy to go over to another.

22. Ch. D. 584.

The question was, whether the grandson should during his infancy be entitled to the interest of this 500*l.* legacy?

Object. Until this contingency has happened, *non constat* whether the infant will ever be entitled to the 500*l.* and consequently he can have no interest for that legacy which never may become due, payable, or vest, until the contingency be over; interest is only due in default of payment, and this legacy not being payable till the grandson's age of twenty-one, ought not to carry interest: it is the same thing, as if [505] a legacy were given to be paid at the legatee's age of twenty-one; and though the legacy is to a grandson, that is not material, in regard the grandfather is not bound to maintain the grandson; and accordingly equity would not supply the want of a surrender in case of the devise of a copyhold to a grandson, as has been adjudged by the Lords upon an appeal in the case of (*a*) *Kettle* versus *Townsend*. Indeed if it was the case of a legacy to a son who had nothing else, this Court might (perhaps) give interest for the son's subsistence, because the father is obliged to maintain him.

(*a*) Salk. 187. But see the case of Watts versus Bullas, vol. 1. 60. and the note thereto subjoined.

Mr. *Lutwyche contra:* The legacy of 500*l.* to the infant grandson, if no time were mentioned for the payment, would by construction of law be payable presently, and equity of course allows interest from the end of the year: if to a son, from the death of the testator for his maintenance; and though there be a condition to make the legacy void on the legatee's dying before twenty-one, yet this is a subsequent condition;

and if the contingency of his death happens it becomes void from that time only. On the other hand, if the contingency never happens, it is as if none had ever been annexed to the legacy, and then the legacy must carry interest, at least from the end of the year after the death of the testator: if instead of a legacy, the testator had devised land to the grandson being an infant, to be void (as here) if the infant should die before the age of twenty-one, the grandson would have had the profits of the land until his death, though he had died before twenty-one; and there is the same reason that the infant in the present case should have the profits or interest of the money until the contingency happens; and this very case has often been determined by the Court.

Master of the Rolls: It is extremely clear, that this is a condition subsequent; and therefore as the infant's death before twenty-one will only defeat the legacy from the time it happens, consequently in the mean while it shall carry interest, at least from the end of the year after the death of the testator (1) (z). [506]

(1) Reg. Lib. B. 1728. fol. 323. by the name of *Taylor* v. *Guest*. Secus, where the legacy is contingent (y); or where, though vested, it does not carry interest. *Heath* v. *Perry*, 3 Atk. 101(x). As to the bequest of a *residue*, vide *Nicholls* v. *Osborne*, ante 419.

(z) So *Studholme* v. *Hodgson*, post 3 vol. 306. (Note 2.) *Montgomerie* v. *Woodley*, 5 Ves. 522. *Lambert* v. *Parker*, Coop. 143.

(y) *Shawe* v. *Cunliffe*, 4 Bro. C. C. 144. *Descrambes* v. *Tomkins*, 4 Bro. C. C. 150, n. 1 Cox, 133. *Glanvill* v. *Glanvill*, 2 Mer. 38. As to the cases where interest on a contingent legacy will be given in the shape of *maintenance*, see note to *Harvey* v. *Harvey*, ante, 22.

(x) *Crickett* v. *Dolby*, 3 Ves. 10. *Ellis* v. *Ellis*, 1 Sch. & L. 1.

DORMER & al' *versus* THURLAND & al'.

CASE 163.

THE bill was brought for raising 2000*l.* out of an estate charged therewith pursuant to a power.

Lord Chancellor KING.

2 Eq. Ca. Ab. 663. pl. 11. 764. pl. 15. Baron and feme seised in fee in right of the feme by deed and fine settled the premises to the use of the baron and feme for their lives, remainder to the first, &c. son in tail, remainder to the daughters in tail, remainder to the husband and wife and their heirs, with power to the baron during the joint lives of him and his wife, by his last will, or any writing purporting to be his last will under hand and seal, attested by three witnesses, if baron dies before his wife, to charge the premises with 2000*l.* The like power (mutatis mutandis) to the wife, if she die first, to charge the premises with the like sum; husband by will under his hand attested by three witnesses, but not sealed, charges the premises with 2000*l.* held void; being without a seal.

DORMER *v.* THURLAND.

The case was, *William Fenwick* Esq. married *Margaret* the only daughter and heir of Sir *Adam Brown* baronet, who died seised in fee of a considerable estate in *Surrey*, and by indenture of the 2d of *February* 1692, and by a fine levied pursuant to the covenants in that indenture, *William Fenwick* and *Margaret* his wife did settle and convey the castle and manor of *Betchworth* in the county of *Surrey* to the use of *William Fenwick* and *Margaret* his wife for their lives, without waste, remainder to the use of trustees and their heirs during the life of him and his wife, to preserve contingent remainders, remainder to the use of their first, &c. son in tail male successively, remainder to their daughters in tail general, remainder to the use of the said *William Fenwick* and *Margaret* his wife, and their heirs,

[507] With a power to the said *William Fenwick*, at any time during the joint lives of him and *Margaret* his wife, by his last will, or any writing purporting to be his last will, under his *hand and seal*, attested by three or more credible witnesses, (if he should die before his wife without any issue between them then living) to charge the premises with any sum or sums not exceeding 2000*l.* to be paid to such persons, and in such proportions as he should appoint; with the like power to *Margaret* if she should die without issue in the life of her husband *Fenwick*.

There was no issue of the marriage, and *William Fenwick* the husband, by his last will in writing under his hand, attested by three witnesses, *but not sealed*, reciting his power of charging the premises with this 2000*l.* disposed of the same to the plaintiffs (being his relations) in the proportions therein mentioned.

There were three witnesses to this will of Mr. *Fenwick*, two of which swore that the will was signed by the testator in the presence of all the three witnesses; but the third swore that the testator *Fenwick*, having written and signed the will before, called for the witnesses, and declared that writing to be his last will, and that all the three witnesses were then present, and subscribed their names in his presence.

The questions were, 1*st*, whether this will *not* being *sealed*, was a good appointment of the 2000*l.* within the power?

2*dly*, Whether it was a good will to charge the land, one of the witnesses swearing, that the testator did not sign the will in the presence of the witnesses, but only acknowledged it
[508] was his hand, and declared it to be his will, and the three witnesses subscribed their names in the testator's presence?

Mr. Solicitor *Talbot* contended for the plaintiffs, that this

will of Mr. *Fenwick* the husband, being a will of land according to the statute, was a good execution of the power, and an effectual charge of the 2000*l.* upon the estate, though not under seal. That this power to charge was in the disjunctive, either by will, or by writing purporting to be a will; now as to the power to charge the land by will, there was no need to guard that, the act of parliament having done it, by directing, 1*st*, That it must be in writing. 2*dly*, That it must be signed by the party; and 3*dly*, That it must be subscribed by three witnesses, which circumstances had all been complied with, and there was no need of a seal to a will.

Then as to the other part of the disjunctive, any writing purporting to be a will, it was plain he said, there might be a writing purporting to be a will, which yet might not be a good will as to lands; as where there are three witnesses to a will, but they do not subscribe their names in the presence of the testator; now this is a writing purporting to be a will, though it is not a will strictly, and according to the statute of frauds, and yet would be good pursuant to the power, because attested by three witnesses, though not subscribed by the testator in the presence of three witnesses; and if the power could bear this construction, it would be reasonable to understand it accordingly, in a case where the testator must be admitted to have had this power, and to have intended to execute it, since he recited this very power, in his will; and it being in case of a will, which is the most favoured of any conveyance, where, if counsel had been advised with, they would have directed the [509] testator to put a seal to the will, it would be very hard, that the plain intention of the party should be overturned by the omission of so slight a circumstance; wherefore, this power being capable of such construction, the Court would understand it so as to make the charge effectual, and there was no necessity to apply to this Court to help an omission, the latter words which required the seal, not referring to the will, but only to a writing purporting to be a will.

On the other side it was said by Mr. *Attorney*, that as this was a voluntary charge, not for any wife (1) or children, but for legatees, if it had not pursued the circumstances which the party confined himself to, and prescribed, as it would be void at law, so there was no reason to aid it in equity. That the latter words requiring a seal, referred as much to the will, as to the writing purporting to be a will; and it was as necessary that this instrument, by which the 2000*l.* was to be charged

(1) Vide *Tollet* v. *Tollet*, ante 489.

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upon the estate, should have a seal, as that it should be attested by three witnesses, for the sentence was not complete until the end, which declared the circumstances required to execute the power; also the principal case could not be intended of a will or devise of lands, for that must be supposed where a man *having lands* devises them; but here Mr. *Fenwick* the testator was only tenant for life; and the will or writing purporting to be a will, must singly and alone operate upon the power.

Where a will of land ought to be signed by the testator in the presence of three witnesses.

As to the second point; it was argued by Mr. *Solicitor General* for the plaintiffs, that there being two witnesses proving the will to have been signed by the testator *Fenwick* in the presence of the three witnesses; this was sufficient to establish the fact, and make the will good; and it had been determined upon debate lately in this Court, in the case of a will of land, that where the testator signed the will, and afterwards declared in the presence of three witnesses, that this was his hand, and desired the three witnesses to attest the same, who subscribed their names in the presence of the testator, this was sufficient. But the counsel on the other side insisted on the case of *Lee* (*a*) and *Libb*, as reported in *Carthew* 35. where C. J. *Holt* was of another opinion.

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(*a*) 1 Show. 68. 3 Mod. 262.

Lord Chancellor said, that though he himself inclined to think the will of the land good, if the testator should acknowledge the name to be his, and the witnesses should subscribe in the presence of the testator, yet that point should be reserved to the defendant (1).

Mr. *Lutwyche* for the defendant: What has been said concerning the intention of the testator is wholly immaterial. If a will of land be made and signed by the testator, and subscribed by two of the most credible witnesses in the world, no body can doubt but that it is the testator's will and intention to pass his estate; but the words of the statute of frauds say, this shall not be a good will; and as the statute says so in the one case, so the law which the testator has here prescribed to himself, not to charge without a writing under his seal, is equally express in the present case. And this charge does not operate by virtue of the will, or other writing, but by virtue of the settlement, and like the case where a copyhold is surrendered to the use of a will, and the will is afterwards made of these copyhold lands, such a will is good, though but with two (*b*) witnesses, or indeed without any witness at all, because the copyhold passes by the surrender, and not by the will.

(*b*) Ante Wagstaff v. Wagstaff 259.

(1) *Longford* v. *Eyre*, ante 1 vol. 740. *Stonehouse* v. *Evelyn*, post. 3 vol. 254.

DORMER *v.* THURLAND. [511]

Lord Chancellor: I take this will to be a good one, and being so, to be a good charge; the power was in the disjunctive, 1*st*, in respect of the husband, who could make a will; and, 2*dly*, in respect of the wife, who could not make a will, but only a writing purporting to be a will; but for the satisfaction of both parties, as it is a matter of law, let it be referred to the judges of *B. R.* to be made a case on both the points; and as to the last point the testator's not signing in the presence of the witnesses, the case to be made upon the depositions, and referring to them.

And it was determined by the judges of *B. R.* on argument, that the will was void as a charge, for want of being sealed (1).

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(1) In *Earl of Darlington* v. *Pulteney*, Cowp. 268. Lord *Mansfield* said he was inclined to think with Lord *King* on the present case, that, the instrument being a *good will*, the power was thereby well executed; but on the other point agreed, that where there is no *meritorious* consideration for the execution of such a power, the form must be strictly pursued. So, *Ross* v. *Ewer*, 3 Atk. 156 (*z*).

(*z*) See *Doe* v. *Morgan*, 7 T. R. 103. Sugden, Powers, 227. (ed. 1821.)

29. ch. D. 233.

RAKESTRAW & al' *versus* BREWER.

CASE 164.

At the Rolls. Sel. Ca. in Cha. 55. Mos. 189. 2 Eq. Ca. Ab. 162. pl. 16. 601. pl. 30. A bill in equity will not lie to redeem a mortgage of chambers in the inns of court, but the plaintiff must apply to the bench or to the judges of the society; secus, if on application to the bench they refer the plaintiff to his remedy in equity. One possessed of a renewable term mortgages it to J. S. who gains a new term from the original landlord to commence after the old one; this new term shall be subject to the old equity of redemption.

THE plaintiffs, as representatives of *Henry Holford* late of *Gray's Inn*, Esq. brought their bill against the defendant, who was the executor of *John Brewer*, Esq. late one of the benchers of that inn, to redeem a mortgage of chambers there made in 1687, and by assignment transferred to *Brewer*. The term mortgaged by *Holford* was for fifty-seven years, being a building term, which would expire at *Lady-day* 1731, and the bench gave a new term for eleven years to Mr. *Brewer*, to commence from the end of the former, and he was the first person who was in possession of the chambers under the mortgage, but had not been in possession for twenty years, so that the plaintiffs came within time (*y*). They first petitioned the

(*y*) See Note (B) to *Cook* v. *Arnham*, post. 3 vol. 287.

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bench to be admitted to redeem, and thereupon the 21*st* of *May* 1726, an order of pension was made, reciting that the matter in dispute betwixt the parties was matter of account which the bench was not capable of taking, and the mortgage
[512] of long standing; but that the plaintiffs were at liberty to seek their remedy in a court of equity, as they should be advised; upon which the plaintiffs brought their bill.

And it was insisted by the defendant, that these chambers mortgaged being in an inn of court, where the students were to enjoy quiet without disturbance, the plaintiffs ought to apply to the bench, and if not redressed there, then to the judges of the society; but that the courts at *Westminster* had been always pleased to decline (1) interposing therein; and the rather for that the legal estate of all the chambers of the house was in trustees; and the order of pension which granted terms in chambers, passed no legal title, nor were the benchers that made such order seised of the legal estate; and though a bill which was only to foreclose the equity of redemption, and supposed the plaintiff to have a legal title, might be proper, yet in the present case it was otherwise, since the plaintiffs neither had, nor could have it, especially as they were the daughters of Mr. *Holford* the mortgagor, who were not capable of having the chambers.

Master of the Rolls: I would not meddle with this title to chambers, which is no legal one (*y*), but the benchers themselves having recommended it to the plaintiffs to come hither, and left them at liberty to make this application, therefore the bill is proper.

It was then urged for the defendant, that if the plaintiffs were proper to redeem the old building term of fifty-one years, which would expire at *Lady-day* 1731, yet they could have no title to the additional term of eleven years, which was distinct from, not interfering with the other term, but independent thereof, and to commence from the expiration of the former,
[513] granted by the bench in pure personal favour and kindness to Mr. *Brewer* their brother bencher: whereas had it been asked for by the plaintiffs, it probably would have been denied,

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(1) The *King* v. *Gray's Inn*, Doug. 353 (*z*).

(*z*) *Cunningham* v. *Wegg*, 2 Bro. C. C. 241.
(*y*) See *Franklyn* v. *Ferne*, Barnard. 30. *Troughton* v. *Binkes*, 6 Ves. 573.

and they being women, were not capable of having chambers by virtue of a new grant; though perhaps if an old term came from a member to executors who were no members, they might have a reasonable time to dispose thereof; but no instance could be given where one, not a member, had a chamber by an original grant.

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Sed per Cur': This additional term comes from the old root, and is of the same nature, subject to the same equity of redemption, else hardships might be brought upon mortgagors by the mortgagees getting such additional terms more easily, as being possessed of one not expired, and by that means worming out and oppressing a poor mortgagor; whereupon a decree for redemption was pronounced by (1) the *Master of the Rolls*, and that afterwards (*a*) affirmed upon an appeal to the *Lord Chancellor* (2).

(*a*) Sab. 12. July 1729.

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(1) Reg. Lib. B. 1728. fol. 224.

(2) Upon the same principle are the cases of *Keech* v. *Sandford*, 2 Eq. Ca. Ab. 741. pl. 7. *Taster* v. *Marriot*, Amb. 668. *Rawe* v. *Chichester*, Amb. 715. *Owen* v. *Williams*, Amb. 734. *Lee* v. *Lord Vernon*, 7 Bro. P. C. 432. *Pickering* v. *Vowles*, 1 Bro. C. C. 197 (*z*).

(*z*) See the note to *Addis* v. *Clement*, ante, 459.

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CASE 165.

(*A Cause by Consent.*)

Lord Chancellor KING.

By a marriage settlement a term for years is created to raise 500*l.* portion for daughters, payable at their age of twenty-one or marriage; proviso if any of the daughters attain the age of twenty-one or marry in the father's life-time, then the portion to be paid within a year after the father's death. Also if any of the daughters die before her portion payable or before her age of twenty-one or marriage, her share to go to the survivor; there was issue a son and three daughters, the first of whom married and received her portion; the second attained twenty-one, married and died without issue, and her husband administered; the third daughter survived both her sisters: resolved the husband as administrator of the second daughter is entitled to her share of the 500*l.* she having lived to twenty-one, so that the right vested in her, and the payment was only suspended till her father's death.

UPON a marriage settlement, part of the lands were settled on *Pitfield* the husband for life in possession, remainder to the wife for life, remainder as to part to trustees for 500 years. Other lands were settled on *Pitfield* the husband's father for life, remainder to *Pitfield* the husband for life, remainder to the said trustees for 500 years, remainder as to * all the respective premises, to the first and every other son of the marriage in tail male successively, remainder to the use of trustees

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for 500 years; and the trust of the several terms for 500 years was to raise 5000*l.* for the portions of the daughters, payable at their ages of twenty-one or marriage, with a proviso that if any of the daughters should attain the age of twenty-one or marriage, in the life of the father, then her portion to be paid at the end of the year after the death of her father, and with another proviso, *that if any of the said daughters should die before her or their portion or portions became payable, and before her or their age of twenty-one or marriage, her or their share or shares to go to the surviving daughters or daughter.*

There was issue by the marriage one son and three daughters, *Elizabeth*, *Anne*, and *Mary*, the eldest daughter *Elizabeth* was married to Sir *Thomas Clerk*, and a larger portion given her than was secured to her by the marriage settlement, and so her third of the 5000*l.* was satisfied. The grandfather and wife died, and the second daughter *Anne* having attained twenty-one married in the father's life-time, and died before her father without issue, her husband administered to her, after which the father died.

The questions were, who should be entitled to the third part of the 5000*l.* which *Anne* the middle daughter would plainly have had a right to in case she had survived her father; 1*st*, whether it should sink into the land, forasmuch as the daughter died before the portion became payable, and so the son take advantage of it? Or,

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2*dly*, Whether by virtue of the proviso, the youngest daughter should be entitled as survivor, the middle daughter dying before the portion became payable? Or,

3*dly*, Whether it should not go to the husband of the middle daughter *Anne*, as administrator to his wife, she having lived to her age of twenty-one and been married?

For the son and heir it was urged, that the constant difference was between a legacy out of a personal estate, and a portion out of land, that if a portion be given out of land payable at a future time, and the daughter dies before that time comes, the portion is to sink into the land for the benefit of the heir, let him be *hæres factus* or *natus;* and this was the present case, as *Anne* the middle daughter died in the life of her father, and the portion was not payable until the end of the year after the father's death.

For the youngest daughter it was said, that by the latter proviso in the settlement, *if any of the daughters should die before her portion became payable*, the surviving daughter was

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to have her share, and the middle daughter dying in her father's life-time, she died before her portion became payable; and therefore, &c.

But on behalf of the husband the administrator, Mr. Solicitor General *Talbot* contended, 1*st*, that as to the youngest daughter she could not be entitled to it, because the middle daughter did attain her age of twenty-one, and was married: whereas to entitle the survivor to take, the other daughter must have died under twenty-one or marriage.

2*dly*, That this third part of the 5000*l.* portion would not sink into the land, because the reason of that construction was for the benefit of the heir, in preference to the administrator of [516] the dead daughter, where such daughter died before twenty-one or marriage, so that she had no occasion for her portion, no want of it to advance her in marriage, nor could she dispose of it by deed, or by any act in her life-time, until her age of twenty-one; whereas that reason could not hold in the present case, the daughter having attained twenty-one, and being married: that the meaning of this proviso was a prudent caution to prevent a sale of the reversion of the land limited to the father, in the father's life-time, which had been found by experience to distress and ruin family estates, but it was hard, when the term was come into possession, that the husband who married this daughter should have no portion with her (1).

And of this opinion was the *Lord Chancellor;* who observed, that equity had strained sometimes, to help a daughter married in her father's life-time, to her portion, but never to deprive a married daughter thereof: his Lordship likewise said, that this last proviso, "if any of the daughters attained to "twenty-one years or marriage in the life of the father, then "such daughter should have her portion paid to her at the end "of one year after the father's death," was without any negative words that she should not be paid her portion *till then;* but the meaning of it was, that then *in all events*, even though the grandfather of such daughter, who had part of the estate comprised in this 500 years' term limited to him for his life, had been living, the reversion should notwithstanding have been sold for the raising of this portion.

So it was decreed, that the husband of *Anne* the second

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(1) Vide *Duke of Chandos* v. *Talbot*, post. 610. *King* v. *Withers*, post. 3 vol. 414.

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daughter should have the third part of the 5000*l.* with interest from the end of the year after the father's death, raised by the sale of a third part of this term, and if that not sufficient, then in case the son who was tenant in tail should happen to die without issue male and under twenty-one, the administrator of *Anne* should have liberty to apply to the Court to be paid what remained due out of the other term, which was to arise by the settlement on the son's death without issue male (1).

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(1) Reg. Lib. B. 1728, fol. 198. by the name of *Pitfield* v. *Ashley*.

CASE 166. SIR JOHN EYLES and Others, the Trustees for the *South-Sea* Company, *versus* WARD.

Lord Chancellor KING.

Sufficient if a Master's report is filed before any proceedings had thereon, though not within four days after it was made.

THE plaintiffs had recovered a decree for a great sum of money, with interest to be computed by the Master; the Master made his report, which was not filed within four days after the making and signing, but was filed before any proceedings had thereon; and on filing the report, it was moved and ordered, that the report should be confirmed *nisi;* when it was to be made absolute, it was shewn for cause, that by a standing order (1) of this Court made by the *Lords Commissioners* in the 4 *W.* & *M.* it was directed, that all reports should be filed within four days after the making, otherwise no decree, order or proceedings, to be had thereupon.

7. Sim. 365.
10. — 182.

Mr. *Solicitor General* and Mr. *Lutwyche:* It is sufficient if the report be filed before any proceedings or order made thereupon, and the parties are under no manner of inconvenience, though the report be not filed within four days after the making; and agreeable hereto is the constant practice.

1. Ves. Abr. 568.

Lord Chancellor asked Mr. *Price* the register how the practice was? who said, that it was sufficient if the report were filed before any proceedings had thereupon, though this were not done within four days after the making; which his Lord-

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(1) Cha. Ord. 189 (*z*).

(*z*) Beames, Ord. in Cha. 292.

ship agreed to, adding that this was the spirit of the order, though the letter seemed otherwise; and the constant practice being according to this construction, many hundred reports would be liable to be set aside, if the order should be literally observed; and no motion was ever known to have been made for filing a report *nunc pro tunc*.

Wherefore the Court took it to be well enough; though in this case the motion to confirm the report *nisi causa* was made the same day that the report was filed (1) (z).

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(1) "His Lordship declared, that "the intention of the Court in making "the said order of the 29th of *October*, "1692, for filing the Master's reports "in four days after they bear date, "was, that no proceedings should be "grounded on reports until the same "were filed; and that before reports "be confirmed unless cause, they ought "to be filed; and the practice of this "Court has always been, not to con- "firm any report till after the same "was filed, and although many reports "have not been filed in four days after "the making the same, yet it doth not "appear, that any order hath been "made for filing a report, the time "being elapsed; and in regard the "report in this cause of the 7th *March* "last hath been confirmed unless cause, "this Court doth order, that the time "for the defendants shewing cause, &c. "be enlarged to the 1st day of the next "term." Reg. Lib. A. 1728, fol. 259.

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6 Sim. 644 (z) So *Harris* v. *De Tastet*, 1 S. & S. 263.
1 Tu. Ch. 220.
4 Tu. Ch. 215.

LORD BROOK *versus* LORD and LADY HERTFORD.

CASE 167.

Lord Chancellor KING.

2 Eq. Ca. Ab. 630. pl. 2.

Lands conveyed to trustees, in trust as to one moiety to A. an infant in tail, as to the other moiety to B. (who is of age) in tail; A. the infant brings a bill for a partition. Cur': Decree a partition, but the trustees not to convey till the infant is of age, that he may join in confirming the partition.

SIR *George Strode* devised diverse manors and lands to trustees and their heirs, in trust (after several other trusts since determined) for his two grandaughters, the Countess of *Hertford* married to the Earl of *Hertford*, and *Frances* Lady *Brook* wife of the late Lord *Brook*, for their lives, share and share alike, remainder to the heirs of their respective bodies, and to the heirs of their bodies respectively, with diverse remainders over. The testator died long since; Lord and Lady *Brook* died, leaving the plaintiff the Lord *Brook* an infant, the only issue of their bodies.

The plaintiff brought this bill for a partition, and that the trustees should convey the legal estate of the separate moiety to be allotted to the plaintiff the Lord *Brook* on this partition, to him and the heirs of his body, in regard, though there might

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be a doubt whether the Lady *Hertford* had more than an estate for life (the words of inheritance being subsequent to (1) the limitation to the heirs of the respective bodies of the daughters) yet as to the plaintiff the Lord *Brook*, who was the only son and heir of the Lady *Brook*, it must be agreed he was entitled to an estate-tail; which was admitted.

Lord Chancellor: Decree a partition, and for that purpose let a commission issue to allot one moiety in severalty to the plaintiff the Lord *Brook*, and the other moiety in severalty to Lady *Hertford*, to hold to them according to their respective estates which they are entitled to under the will, and let the plaintiff and the defendant the Lady *Hertford* be respectively quieted in the possession of the premises severally to be allotted as aforesaid; but forasmuch as the infant plaintiff cannot join in a conveyance of the moiety to the Lady *Hertford*, so that there cannot be mutual conveyances, let the conveyances to be made by the trustees of the legal estate be respited, until the infant plaintiff comes to twenty-one or farther order of the Court, at which time all parties interested may join in mutual conveyances (2).

Then it was objected that the will of Sir *George Strode*, under whom the infant plaintiff the Lord *Brook* claimed, was not proved.

Cur': This will not be material; for an infant, when plaintiff, is as much bound, and as little privileged, as one of full age (3).

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(1) Vide *Legate* v. *Sewell*, ante, 1 vol. 87.

(2) Reg. Lib. A. 1728, fol. 421. So, *Tuckfield* v. *Buller*, Amb. 197 (*z*).

(3) *Gregory* v. *Molesworth*, 3 Atk. 626.

(*z*) *Attorney General* v. *Hamilton*, 1 Madd. 214.

DE

TERM. PASCHÆ, 1729.

FOX & al' *versus* AYDE & al'. CASE 168.

(*Heard first by Default* 5 July 1728, *and also on Defendant's shewing Cause the* 5*th of* May 1729.)

THIS was a bill brought to establish a *modus* in favour of the inhabitants of the parish of *Sturton* in *Nottinghamshire;* the *modus* was, in consideration that after the grass was cut, the parishioner at his own costs and charges did make the tithe grass into hay, by strewing the grass upon the ground, (which is called tedding of it,) and afterwards gathering it into week and wind-rows, therefore the persons that inhabited within this parish (which parish appeared to be the greatest part thereof meadow land) were to pay no tithes for the herbage of dry and unprofitable cattle.

Fitzgib. 52. 2 Eq. Ca. Ab. 735. pl. 5. A modus, that in consideration the parishioners made the tithe grass into hay, therefore the parishioners inhabitants within the parish were to pay no tithes for the herbage of dry and unprofitable cattle, and though proved that the parishioners time out of mind had paid no tithe of this herbage, yet the Court held it to be a material objection to the modus, that foreigners living out of the parish made the tithe grass into hay, and yet paid tithe herbage.

But though it was proved in the cause that the parishioners [521] had not time out of mind paid tithes for the herbage of dry and unprofitable cattle, yet there was no evidence that this excuse for not paying of tithes of herbage, was in consideration of the parishioners making tithe grass into hay. On the other hand it was proved, that foreigners, those who lived out of the town, made the tithe grass into hay, as well as the inhabitants, and yet paid tithe herbage. Also it was proved by the plaintiffs, that the grass was tedded and spread, and not divided into heaps or cocks, until the same was made into hay; that in this parish there was a vicar endowed with the small tithes, the rectory an impropriation, and that the vicar had 40*l.* per annum out of it.

Lord Chancellor: 1*st*, This may be a good custom or *modus*, to excuse the occupier of the same land wherein the parishioner

Fox *v.* Ayde. The Court held it to be a void modus, that the making the tithe grass into hay should not only excuse

made grass into hay from paying tithes for the after-herbage, but it can be no good *modus* to excuse the herbage tithe of other land, for at that rate a man might mow and make into hay only a small parcel of ground containing about a quarter or half an acre of land, and by this means be excused from the tithe herbage of 100 head of cattle.

that ground from paying tithes for herbage, but that perhaps a small quantity of meadow ground, by making the grass thereof into hay, should excuse the greater part of the ground of that parish from paying tithe herbage.

2*dly*, It seems to me a material objection against the custom, that foreigners living out of the parish, though they have no privilege of being tithe free as to their herbage, yet have made the tithe grass into hay, which looks as if it was the usage of that parish for the parishioners to make their grass into hay of course.

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3*dly*, It seems material what some of the witnesses have proved, that in this parish the parishioners when they cut down the grass, did not divide it into ten parts, until such time as they had made it into hay; for of consequence the parson could not have any opportunity of making his tithe grass into hay himself.

But, 4*thly*, It being objected, that the consideration of making the tithe grass into hay for the benefit of the rector, could be no consideration as to the vicar who was entitled to the small tithes of herbage;

A modus in relation to the tithe due to the parson may be a good bar to the payment of a small tithe due to the vicar, because all the tithes did at first belong to the parson, during which time he might agree to this modus.

Lord Chancellor: That (*a*) is nothing, for originally and of common right the parson was entitled to all the tithes, as well small as great, and the *modus* (supposing it to be a good one) must have been time out of mind, and consequently must have begun while the parson was seised of the small, as well as of the great tithes; and when afterwards the vicarage was derived out of the parsonage, and the parson by consent of the patron and ordinary endowed the vicar with these small tithes, this shall not prejudice the parishioners, or deprive them of the benefit of enjoying their *modus* which they before were entitled to (1).

(*a*) See for this in Yelv. 86. Cro. Jac. 116. *Green* versus *Austin;* but see also 3 Bulst. 220. *Wintall* versus *Child,* and 2 Keb. 212. *Brown* versus *Haywood,* contra.

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(1) *Woodnoth* v. *Lord Cobham,* Bunb. 180. *Bennet* v. *Peart,* in Exchequer, July 17, 1786 (*z*).

(*z*) 4 Gwill. 1272. 1 Anst. 322. (*n*) nomine *Bennet* v. *Read.*

5thly, It was objected, that the parishioners *de jure* ought to make the tithe grass into hay.

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Parishioners only bound to cut the grass and to lay it into heaps or cocks, but not bound to make it into hay.

The *Lord Chancellor* declared the law to be otherwise, and interrupted the counsel when they began to speak to this, saying that all the parishioners were bound to do was, to cut down the grass and divide it into ten parts, after which the (*a*) parson was to make it into hay. And that this had been so resolved in a *Devonshire* case, (the case of one *Reynolds*;) however, in regard foreigners having meadow land in this parish made their tithe grass into hay as well as the parishioners, and yet paid tithe of the herbage; and by reason of the other objections above mentioned, it would be too much in a court of equity to establish this *modus*, especially where it was insisted upon (as in this case) that the parishioners making tithe grass into hay did not only excuse the herbage of that ground from tithe herbage, but also all the tithe herbage that the parishioner was to pay for any land he depastured within the parish, though it might be a great parcel of pasture land, and though the same might be fed all the year.

Dismiss the bill with costs, but without prejudice as to any litigation, that may be made touching the same at law (1).

(*a*) See 1 Rol. Abr. 644. *accord'*. But see also 1 Rol. Rep. 172. *contra*; and note, the tithes are called the tithe of hay and not of grass. Et vide 2 Burn. Ecc. Law (4to) 403 (*z*).

(1) Reg. Lib. A. 1728, fol. 511.

(*z*) See *Newman* v. *Morgan*, 10 East, 5. *Halliwell* v. *Trappes*, 2 Taunt. 56.

BARRY *versus* EDGEWORTH.

Case 169.

At the Rolls.

1 Eq. Ca. Ab. 178. pl. 18. I devise all my land and estate in D. to J. S. decreed a fee passes, these words carrying not only the lands but also the testator's interest in the land.

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Judith *Only* had a sister the plaintiff *Elizabeth*, wife of the plaintiff *Barry*, and intending to marry the defendant *Edgeworth*, the wedding day was appointed and the wedding clothes bought, but before marriage **Judith Only* falling sick made her will, by which she devised *all her land and estate in* Upper Catesby *in Northamptonshire*, with all their appurtenances, to *William Edgeworth* of *St. Margaret's*, Esq., without saying for what estate. After the testatrix's death, the plaintiff being heir at law brought her bill for the writings.

BARRY v. EDGEWORTH.

The defendant the devisee confessed he had the writings, but insisted that he had the inheritance and fee-simple of the premises, and consequently was entitled to the writings. Whereupon the sole question was, whether the defendant *Edgeworth* had an estate for life only, or an estate in fee, by virtue of this will?

It was objected, that only an estate for life passed in these lands; for where a man devises his land and estate in such a place, it describes only the thing, and not the interest in it, and the words *in Upper Catesby* do nothing but point out the locality of the thing, and lands and estate in this case are synonymous.

(*a*) Salk. 236.

Master of the Rolls: The case of the Countess of (*a*) *Bridgewater* versus the Duke of *Bolton*, seems to have settled the law in this point, it being a resolution given on great consideration, in which the Lord *Cowper*, when of counsel, discouraged a writ of error in parliament; and the Lord Chief Justice *Holt*, who pronounced the judgment of the Court, laid it down as a rule, that a devise of all one's real estate, comprehends not only the thing but also the interest in it; the word [estate] naturally signifies the interest rather than the subject, and its primary signification refers thereto; and though the devise be of all her land and estate in *Upper Catesby*, this is not restrictive with respect to the *estate* intended to pass by the will, but only as to the *land*, as if the testatrix had land in another parish, (suppose for instance in *Lower Catesby*) those lands in *Lower Catesby* could not have passed by the will; and as the word [estate] (*b*) has been agreed and settled to convey a fee in a will, it would be dangerous to refine upon it; for then none could give any opinion thereupon; and these words, or the like, are frequently made use of in wills: besides, the word [estate] if it did not pass a fee in the present case, would be quite void; since the devise of the lands did before of itself pass an estate for life, and no word in a will shall be rejected that can have any construction (1).

The word [estate] naturally signifies rather the interest in the thing, than the thing itself.

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(*b*) 2 Vern. 564. Preced. in Chan. 264.

(1) As to the operation of the word "estate" in a devise, vide *Bridgewater* v. *Duke of Bolton*, 1 Salk. 236. *Chester* v. *Painter*, ante, 335. *Ibbetson* v. *Beckwith*, Ca. temp. Tal. 157. *Tanner* v. *Wise*, Ca. temp. Tal. 284, and post. 3 vol. 295. S. C. *Tuffnell* v. *Page*, Barnard. 9, and 2 Atk. 37. S. C. *Ridout* v. *Pain*, 3 Atk. 486. *Goodwyn* v. *Goodwyn*, 1 Vez. 228. *Bailis* v. *Gale*, 2 Vez. 48. *Frogmorton* v. *Wright*, 3 Wils. 414. *Stiles* v. *Walford*, 2 Bla. Rep. 938. *Macarce* v. *Tall*, Amb. 181. *Hogan* v. *Jackson*, Cowp. 306. *Loveacres* v. *Blight*, Cowp. 352. *Denn* v. *Gaskin*, Cowp.

Dismiss the bill (1).

BARRY *v.* EDGEWORTH.

657. *Right* v. *Sidebotham*, Doug. 734. *Holdfast* v. *Marten*, 1 T. R. 411. *Fletcher* v. *Smiton*, 2 T. R. 656. *Doe* v. *Chapman*, 1 H. Bl. 223 (*z*).

(1) Reg. Lib. A. 1728. fol. 233.

(*z*) *Price* v. *Gibson*, 2 Eden. 115. *Doe* v. *Allen*, 8 T. R. 497. *Pettiward* v. *Prescott*, 7 Ves. 541. *Barnes* v. *Patch*, 8 Ves. 604. *Woollam* v. *Kenworthy*, 9 Ves. 137. *Roe* v. *Wright*, 7 East, 259. *Doe* v. *Clayton*, 8 East, 141. *Chichester* v. *Oxenden*, 4 Taunt. 176. *Chorlton* v. *Taylor*, 3 V. & B. 160. *Uthwatt* v. *Bryant*, 6 Taunt. 317. *Roe* v. *Bacon*, 4 M. & S. 366. *Randall* v. *Tuchin*, 6 Taunt. 410. *Denn* v. *Hood*, 7 Taunt. 35. *Harding* v. *Gardner*, 1 Brod. & B. 72. *Doe* v. *Hurrell*, 5 B. & A. 18. *Doe* v. *Gilbert*, 3 Brod. & B. 85. See also *Cave* v. *Cave*, 2 Eden, 139, and the cases there collected in note (*b*), page 145, on the force of the words "property" and "effects;" to which may be added *Patton* v. *Randall*, 1 Jac. & W. 189.

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TERM. S. TRINITATIS, 1729.

CLEAVER *versus* SPURLING.

CASE 170.

At the Rolls. Mos. 189. 2 Eq. Ca. Ab. 270. pl. 29, &c. A freeman of London having but one child, advances that child in part only, the child shall take a full share without bringing what she had before received into hotchpot: for the only meaning of bringing the child's share into hotchpot is to make an equality among the children.

ANTHONY *Cleaver*, a freeman of *London*, had a son and three daughters, and advanced all his children in marriage in his life-time; his son died leaving sons, all his daughters died also in his life-time, except his eldest daughter *Hannah*, whom the father advanced in marriage above forty years before his death, but the certainty of the portion did not appear under the father's hand, who by his will, taking notice that he had advanced his only daughter in marriage, gave to her 35*l.* provided that if she or her husband should refuse to give a release to his executors after his [the testator's] death, or should any ways trouble or disturb them, upon any claim or pretence by virtue of the custom of *London*, that the legacy of 35*l.* given to his daughter, should go over to the children of his youngest deceased daughter; and gave the bulk of his personal estate (being leasehold) to his two grandsons the sons of his deceased son, and died leaving a wife and one only surviving daughter.

CLEAVER v. SPURLING.

In this case after solemn debate, it was adjudged, 1*st*, that if the daughter had been advanced only in part, she should (*a*) still have come in for her full orphanage, for that the child's bringing her partial advancement into hotchpot, is only in order to make an equality among the children, and not for the benefit of the mother, or to increase the dead man's part.

(*a*) Salk. 426. 2 Vern. 234. 629. 754.

If a freeman has several children, or but one child, and has in his life-time fully advanced that one child, or all his children, it is the same as if there was no child, and the freeman may dispose of his estate as if there was none; so if a freeman compounds with his wife before marriage for her customary part, it is the same as if no wife.

2*dly*, That if a freeman having several children, or one child, does fully advance all his children, or his single child, this satisfies the custom, and is the same as if the testator had no child; or if the husband freeman before his marriage compounds with his intended wife as to her customary part, it is the same as if there was no wife (1).

If a freeman has advanced his child on marriage, and the certainty of that advancement does not appear under the freeman's hand, this is to be taken as a full advancement; but the freeman's declaration alone in his will that he has fully advanced his child, is not of itself sufficient evidence.

3*dly*, That if the freeman shall have advanced his child in marriage, and the certainty of that advancement does (2) not appear under the freeman's hand, this must be intended and taken to be a full and complete advancement; and his Honour said that the advancement in the present case being made about forty years before the death of the freeman, this declaration in the will, that the daughter was fully advanced was an evidence thereof; especially it being so difficult a thing for the legatees in the freeman's will to prove an advancement made at that great distance of time; but it being objected, that the father's own declaration in his will was of very little avail, since at that rate it would be in the (*a*) power of every freeman, by making such declaration to bar * his child of the orphanage part: thereupon a proof was read, that the daughter's husband had himself confessed he had received above 1000*l.* portion with his wife from the freeman at his marriage, which was satisfactory.

(*a*) See Blunden v. Barker, 1 vol. 634, &c.

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4*thly*, It was urged that still the 35*l.* legacy ought to be paid to the daughter, and it would be hard to construe the insisting in a court of justice upon a matter as one's right, to be a forfeiture, especially when it was the right of a feme covert.

To which it was answered, that the father having given this

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(1) *Blunden* v. *Barker*, ante, 1 vol. 644. *Pusey* v. *Desbouverie*, post. 3 vol. 315. *Medcalfe* v. *Ives*, 1 Atk. 64. *Morris* v. *Burroughs*, 1 Atk. 403.

(2) Salk. 426. 1 Vern. 216. 2 Vern. 630. *Fawkener* v. *Watts*, 1 Atk. 406. *Elliott* v. *Collier*, 3 Atk. 527, and 1 Wils. 168. S. C.

CLEAVER v. SPURLING. The freeman by his will gives 35*l.* to his daughter, provided that if she refuse to give a release, or put the executors to any trouble, then her legacy of 35*l.* to go over to her sister's children; the daughter claims her orphanage part, and her husband joined in the claim, and does not claim the 35*l.* legacy. Decreed the daughter and her husband's claiming the orphanage part was a forfeiture, and the 35*l.* being vested in the devisee over, equity will not divest it.

legacy of 35*l.* to his daughter upon the express condition that she or her husband should make no claim, nor give any disturbance to the executors, upon pretence of the custom of *London*, and the husband and his wife having insisted upon the custom, the same was a forfeiture of the legacy; and however it might have been construed to be intended (1) only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not divest it.

And the *Master of the Rolls* compared it to the case of a devise of a legacy to a child, upon condition (2) that she married with consent of the executor, but if she should not marry with such consent, then the legacy to go over; though this (he said) was against the rule of the civil law, according to which *maritagium debet esse liberum*, yet it is a good condition by our law, and when the legacy is once vested in the devisee over, equity cannot fetch it back again. Also there was no colour to help the defendant the daughter to her 35*l.* legacy, since she had made no claim to it by her answer; and as to its being the right of a feme covert, all personal things were under the power of the husband, who could either release or forfeit them; wherefore the Court decreed that the daughter was barred of her customary part, as being fully advanced, and likewise that she and her husband had forfeited the 35*l.* legacy by her claiming her orphanage part and by reason of the devise over (3)

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(1) Vide *Webb* v. *Webb*, ante 1 vol. 136.

(2) Vide *Peyton* v. *Bury*, post. 626.

(3) Bill dismissed, Reg. Lib. A. 1723, fol. 314.

1913. a. c. 79.

CRAY *versus* WILLIS.

CASE 171.

At the Rolls. Mos. 184. 1 Eq. Ca. Ab. 243. pl. 3.

A. BEQUEATHED the surplus of his personal estate to *B.* and *C.* (1) making them executors, and died; upon the death of

(1) The report in *Moseley* states the gift of the residue to have been to the testatrix's son *Samuel*, and her daughter *Hannah*, "their executors and administrators for ever." But these latter words do not appear in Reg. Lib.

CRAY v. WILLIS.
2 Eq. Ca. Ab. 457. pl. 2. 458. pl. 4. 537. pl. 1.
A. makes two executors B. and C. appointing them residuary legatees; B. dies, the whole shall survive to C.

B. the question was, whether this being a matter legatory, and suable in the Spiritual Court (where survivorship would not be allowed) the survivor should be liable to account with the representative of the deceased executor? and after time taken to consider of the case, his Honour now gave his opinion.

Master of the Rolls: A right of survivorship is as good as a right by descent; neither is there any thing unreasonable (1) or unequal in the law of jointenancy, each having an equal chance to survive; and the duration of all lives being uncertain, if either party has an ill opinion of his own life, he may sever the jointenancy by a deed granting over a moiety in trust for himself; so that survivorship can be no hardship, where either side may at pleasure prevent it. It is plain that at law in case of a grant of a term for years to two, the thing granted must survive, if the jointenancy be not severed.

[530] The hardest case of a jointenancy, and which was thought so to be in the House of Lords, was that of *Wilkinson* versus *Spearman* cited in *Cook*'versus *Cook*, 2 *Vern.* 545. where one devised lands to his two daughters and the heirs of their bodies, one of them died leaving issue, and the survivor claimed the whole, they having been jointenants for life, with several inheritances; the Lords were inclinable to give a moiety to the issue of the daughter who died first; but the judges informing their Lordships, that the law was settled in this point, they would not alter it. A right of survivorship is much more reasonable than a right by occupancy; and yet this latter, as unreasonable as it was, prevailed until the statute of frauds took it away.

But put the case of a *trust* instead of a *legal estate*, or suppose lands are granted for years to *A.* in trust for *B.* and *C.*, *B.* dies, and his executors get a moiety of the term assigned to them by the trustee, yet a court of equity would help the surviving jointenant to that moiety against the executors of him who died first. 2 *Vern.* 556. *Aston* versus *Smallman.* Now this is pretty near the present case, which is that of a trust, since every executor after debts paid, is a trustee for the legacies.

But it is objected, that in case of a legacy given to two, it shall not survive, because a legacy is recoverable in the spiritual

(1) Vide *Barker* v. *Giles*, ante, 281. *Staples* v. *Maurice*, 7 Bro. P. C. 49.

court, where the rule of the civil law takes place, which rule is against survivorship.

Resp. I do not see that a court of equity should, even in case of a legacy, judge according to the civil law, but ought rather to pursue the common law, which is the general law of the land; for all legatees are volunteers, and ought to stand or [531] fall by the rules of the common law. And that this Court does in other cases determine the right of legacies according to the rules of the common, and not of the civil law, is plain from a common case: as suppose I devise to my daughter 1000*l.* on condition that she marry with her mother's consent, with a devise over in case she does not marry with such consent; if the daughter does marry without her mother's consent, a court of equity determines the devise over and the condition to be good, though the civil law says they are both (*a*) void, for by that law *maritagium debet esse liberum.* And if a court of equity is to determine according to the rules of the common law in the case of one legacy, why not in others? Besides, in case of a legacy or term for years given to two, if the executors assent to the legacy, and one of the legatees dies, the legacy then will be admitted to survive, because by the consent of the executors the legacy is become a legal property, and consequently determinable according to the rules of the common law.

(*a*) See the preceding case.

Now it is not very reasonable that when the debts are all paid (as they are in this case) the executors delaying to give their consent to do what in equity they ought, nay what they are compellable to do, viz. to consent to a legacy, should defer the vesting a legal right in a third person.

But if this were so, here is an *implied assent:* If I devise a term for years to my executor, who enters generally, he may *prima facie* take as legatee, this being more for his advantage; though it is otherwise where I devise a term to my executor for life only, with remainder to *J. S.* Because if the term were vested in the remainder man, it could not be divested out of him again, and so might make a *devastavit*, 1 *Roll. Abr.* 619. [532] *Cro. Eliz.* 347. *Pannel* versus *Fenn;* and though the present case is of a devise of a surplus, and it must be admitted, that until debts, &c. are paid it cannot be known what the surplus is, yet here where all the debts and legacies are paid, it may well be known what it is, and so there may be an assent to this legacy. Farther, if these two joint residuary legatees should be taken as tenants in common, then if one of them had died in the life of the testator, one moiety of the personal

CRAY v. WILLIS.

estate (1) would have gone to the next of kin to the testator according to the statute of distribution, which would hardly be admitted.

As to authorities, though there may be some scattered ones against survivorship, in case of a legacy's being bequeathed to two, yet the last and most considerable authority is in 1 *Vern.* 482. *Lady Shore* versus *Billingsley*, (the same case reported in *Jones* [*Thomas*] 162.) where it was adjudged before the delegates, and decreed by Lord Keeper *North*, which decree was also affirmed by Lord *Jefferies*, that where a surplus of a personal estate was devised to *A.* and *B.* this was a joint devise, and should survive; and that it was the same as if *A.* and *B.* had been made joint executors, and *A.* had possessed a moiety of the goods and died, in which case the survivor should have all; and there it is said, that the case of *Cox* versus *Quantock*, which in 1 *Chan. Cases* 238. was at first decreed to the dissatisfaction of the bar, was reversed upon a rehearing; and agreeably thereto, (viz.) that there should be a survivorship, was decreed in 2 *Chan. Cases* 64. where a devise of a surplus was to executors; and the *Lord Chancellor* said it would survive upon the death of either; his Lordship in that case making use of this expression, *the judges will have it so.* See also *Jones* [*Thomas*] 130. *Bastard* versus *Stukely*, where a devise
[533] was of the surplus to two, upon which the executor consented, and then one died, this consent of the executor turned the right of the legatee into a legal property, which therefore should survive. Accordingly I think the survivor must in the present case take the whole (2).

By which this point seems now fully settled in favour of survivorship (3).

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(1) *Bagwell* v. *Dry*, ante, 1 vol. 700. *Page* v. *Page*, ante, 489.

(2) Reg. Lib. A. 1728, fol. 475.

(3) Vide *Webster* v. *Webster*, ante, 347. *Willing* v. *Baine*, post. 3 vol. 115. *Perkins* v. *Baynton*, 1 Bro. C. C. 118. *Jolliffe* v. *East*, 3 Bro. C. C. 25. *Balwyn* v. *Johnson*, 3 Bro. C. C. 455 (*z*).

(*z*) *Campbell* v. *Campbell*, 4 Bro. C. C. 15. *Morley* v. *Bird*, *Stuart* v. *Bruce*, 3 Ves. 629, 632. *Jackson* v. *Jackson*, 7 Ves. 535, 9 Ves. 591. *Crooke* v. *De Vandes*, 9 Ves. 197. *Swaine* v. *Burton*, 15 Ves. 365. *Gant* v. *Lawrence*, Wight. 395.

POULSON *versus* WELLINGTON. CASE 172.

THE plaintiff, as administrator of his late wife *Mary*, who was the widow of one *Wellington*, a freeman of *London*, brought this bill for the recovery of four ninths of *Wellington* the freeman's personal estate.

Lord Chancellor KING.

2 Eq. Ca. Ab. 131. pl. 3. A widow of a freeman of London who left children, and died intestate, was entitled to four ninths of his personal estate, and having by deed assigned over her four ninths for her separate use in case of marriage, and to such persons as she should appoint, and for want of such appointment, then to her children; the widow intending to marry a second husband, by another deed to which the intended husband was party, in consideration of the intended marriage, and of a settlement made on her by him, recites that if she did not dispose of her four ninths, the husband would be entitled thereto, and then assigns it over to trustees in trust for the intended husband during their joint lives, subject to her control and disposal by writing, and dies without disposing of it. Decreed the second husband is a purchaser, and the recital, that he would be entitled to it if the wife should not dispose of it, was a gift.

The case was; *Wellington* the freeman had a wife, the said *Mary*, and three children, and died intestate; *Mary* the widow, after the death of her first husband, and before her second marriage, by indenture dated the 30th of *November* 1719, assigned five ninths of her late husband's personal estate in trust for her children, and as to the four remaining ninths, to which she was entitled, (three ninths as her customary part, being a freeman's widow, and a third of a third being the dead man's part, which made another ninth, and belonged to the widow by the statute of distribution of intestate's estates,) the widow by her said deed of the 30th of *November* 1719, assigned these four ninths to trustees, in trust for her separate use for her life, [534] in case she should marry, and afterwards in trust for such purposes, and such persons as she should by deed to be attested by two witnesses appoint; and for want of such appointment, to her children by the first marriage; but the husband which she should marry, on his surviving her, to have 200*l.* out of the four ninths. Afterwards, she having agreed to marry the plaintiff, by indenture dated the 11th *January* 1720, to which the plaintiff was a party, and attested by two witnesses pursuant to the power, reciting that she had before settled the children's five ninths in trust for them, and that in case she should make no appointment of her own four ninths, *they would belong to her then intended husband* the plaintiff *Poulson*, by this deed assigned her said four ninths in trust for the plaintiff *Poulson* during their joint lives, but she to have the management and ordering thereof during the coverture, or by any writing duly attested to appoint it over; and the plaintiff *Poulson* by this indenture covenanted to settle a leasehold estate upon the wife for her life, and afterwards to the issue of

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the marriage. The plaintiff *Poulson* married the said *Mary*, and she afterwards dying without issue by him, and without making any appointment,

The question was, to whom the wife's four ninths should go, whether to the second husband, or only the 200*l.* to go to him, and the residue to her children, for want of an appointment made by the wife after the second marriage?

Lord Chancellor for some time much doubted thereof, for that the plaintiff the husband had notice of the wife's first deed; but because he was a purchaser of these four ninths, and

[535] it being recited in the last deed, that in case the wife died without making an appointment, the plaintiff *the second husband would be entitled thereto*, which, though but (1) a recital, yet shewed the intention and agreement of the parties, and amounted to an [informal] appointment, and as no strict form is requisite to constitute such appointment, and since the latter deed varied the power reserved to the wife, the first deed requiring that it should be by writing attested by two witnesses, and yet by the latter deed, the power of appointment reserved to the wife being by any writing duly attested, (in which case a writing would have been duly attested, though it had but one witness;)

For these reasons his Lordship, yet with some hesitation, decreed (2) the four ninths to the plaintiff the second husband, but at the same time declared it to be clearly his opinion, that if the plaintiff the second husband had no notice of the first deed made by the wife while she was a widow, this would have been a void deed, and fraudulent as against him (3).

May 1730. This decree was afterwards affirmed on an appeal to the House of Lords.

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(1) Vide *Bamfield* v. *Popham*, ante, 1 vol. 59. *Bibin* v. *Walker*, Amb. 661 (*z*).

(2) Reg. Lib. B. 1728, fol. 387. by the name of *Poulson* v. *Darby*.

(3) Sed vide *Cotton* v. *King*, ante, 358. *King* v. *Cotton*, post. 674.

(*z*) *Wilson* v. *Piggott*, 2 Ves. jun. 355.

POWELL *versus* PRICE & al', & e contra. In Scacc'. CASE 173.

UPON Sir *Thomas Powell*'s marriage with *Elizabeth Mansell*, and in consideration of it, and of 5000*l.* portion, by articles dated the 2d of *March* 1693, for making provisions for the issue of that * marriage, Sir *Thomas Powell* covenanted for the wife's trustees to make, do or execute, one or more conveyance of the premises in question in *Carmarthenshire*, and for the better directing the making of the said settlement, to the use of himself for life, without waste, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder as to part, to *Elizabeth* the wife for her jointure, remainder as to the whole, to the use of the first, &c. son of the marriage in tail male successively, remainder to the heirs male of his own body, (*i. e.* by any wife) *remainder to the heirs of his body by his said wife Elizabeth*, and for want of such issue, remainder to the right heirs of Sir *Thomas Powell* himself. In which articles there was a clause impowering Sir *Thomas Powell* and his lady to make leases at the old rent; also a clause that if Sir *Thomas Powell* should die without issue male by *Elizabeth*, and there should be daughters, if but one daughter, then such daughter should have the sum of 3000*l.* if more daughters than one 4000*l.* among them, and this was agreed to be secured on some part of the estate.

2 Eq. Ca. Ab. 40. pl. 3. Articles on marriage to settle lands on husband and wife for their lives, remainder to the first, &c. son of the marriage, remainder to the heirs male of the body of the husband by any wife, remainder to the heirs of the body of the husband by the first wife, remainder to the husband in fee, with provisions for the daughters of the first marriage, if no son; husband has one daughter by the first wife, suffers a recovery, and marries a second wife, and takes notice of the first marriage articles in his second marriage settlement; the daughter by the first marriage barred by this recovery.

The fact happened to be, that there was but one daughter by this marriage, *Elizabeth* married to the defendant Sir *John Price*, and no son. [*536]

Sir *Thomas Powell* surviving his first wife *Elizabeth*, and intending to marry a second wife, *Judith* the daughter of Sir *James Herbert*, suffered a common recovery of the premises, and by lease and release dated the 25 & 26 *July* 1698, settled his whole estate to the use of himself for life, remainder as to part, to the use of his second wife for life, remainder to the first, &c. son of the second marriage in tail male successively, remainder to trustees for 500 years to raise 5000*l.* for daughters of the marriage, (if no son,) remainder to Sir *Thomas Powell* in fee; as to the other part of the premises, to the use of trustees for ninety-nine years, in trust, after Sir *Thomas Powell*'s death, to raise 3000*l.* for *Elizabeth*, daughter of Sir *Thomas Powell* by the first marriage, (now Lady *Price*); [537]

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and this was declared to be in satisfaction of all monies she was entitled to by the first marriage articles; and in the meantime she to have 100*l.* per annum for her maintenance, remainder to Sir *Thomas Powell* and his heirs. Three of the *Mansells* (relations of the first wife) were parties to this second marriage settlement. Sir *Thomas Powell* had issue three daughters by his second wife, but no son, and died in *August* 1720.

The question was, (here being notice of the first marriage articles, by which there was a limitation, after that to the heirs male of Sir *Thomas Powell* by any wife, *to the heirs of the body of Sir* Thomas *by* Elizabeth *his first wife*) whether this being in case of articles, should not be taken as if the limitation had been *to the daughters of Sir* Thomas Powell *by his first wife*, for then they could not be barred by the recovery.

For Sir *John Price* and his lady it was insisted, that her mother and the issue of the marriage (and consequently the Lady *Price* as being the only child of the marriage) were purchasers in consideration of the marriage and the mother's portion of 5000*l.* That the limitation *to the heirs of the body of Sir* Thomas Powell *by* Elizabeth *his first wife*, being by way of articles, must be the same as if it had been to the *daughters;* for it could not be intended in favour of the sons of that marriage, there being an express limitation before to them; and though if this had been in a settlement, there being a precedent
[538] limitation for life to Sir *Thomas Powell*, it would have been an estate-tail in him, and barrable by the common recovery, yet it was otherwise where it rested upon articles; for in that case, an express estate for life being limited to the husband, (as here) such express estate excludes the raising or vesting of any different estate in him, by virtue of any limitation to *the heirs of his body;* and so it was determined in the case of (*a*) *West* and *Errissey*, which though adjudged in the Exchequer contrary to what was now laboured for, yet that judgment was reversed in the House of Lords; likewise in the case of *Trevor* (*b*) and *Trevor* decreed first by Lord Chancellor *Macclesfield*, and afterwards affirmed in the House of Lords, as also 2 *Vern.* 526. *Leonard* versus *Earl of Sussex*, and *White* versus *Thornborough*, 2 *Vern.* 702. It was admitted there was a prior limitation in the articles to the heirs male of the body of Sir *Thomas Powell* by any wife, but this being by way of articles must have the same construction as if it had been to the *sons* of Sir *Thomas* by any wife, and the subsequent limitation was

(*a*) See ante 349.

(*b*) See vol. I. 622.

to the heirs of the body of Sir Thomas Powell *by* Elizabeth *his first wife*, so that the daughters by the first wife were then in view, their further advancement, upon the contingency of failure of issue male, in contemplation of the parties, and the benefit of such contingency was to be an addition to their portion, and might well be intended to make it up equal to what their mother brought, which was 5000*l.* and though there was a portion of 3000*l.* for one daughter, and 4000*l.* for more daughters by the first marriage, yet this was a provision which was to come to them in all events, but then the daughters by the first marriage were to have the benefit of this contingency besides, to have the land if there were no sons, which would be some compensation for the smallness of their portion.

It was also admitted, that if the trustees or second wife had [539] no notice of the articles made on the first marriage, then their being purchasers without notice would have been a bar to the plaintiff's claim by the articles.

On the other side it was said and resolved, that though here was notice of the marriage articles, yet the 3000*l.* secured by the settlement on the second marriage, was an actual satisfaction of all demands by these articles; and though a limitation by articles to the heirs male of the marriage, after an express estate for life to the father, shall be taken to mean a remainder to the first, &c. son, it does not follow, that such a limitation to the heirs of the body must be equivalent to a remainder limited to daughters; especially in this case, where they were postponed to the limitation to the heirs male of the body of Sir *Thomas Powell* by any wife, and where there was an express pecuniary provision made for the daughters by the first wife, which was all the said daughters were to depend upon; besides, that sons are of a different consideration in equity from daughters, they being to support the name of the family, which daughters do not; also in the general course of marriage settlements, daughters are provided for by pecuniary portions, and not by land; that the legal estate being now in those who claimed under the second marriage settlement, and had an equal equity, it would be hard to take the benefit of the law from them, by raking into old stale articles, and disturbing settlements made on valuable consideration, as that in the present case was, where the parties had both the law and equity on their side. As to the case of *West* versus *Errissey*, that, it was true, was adjudged in the House of Lords contrary to the [540] decree made here in the Exchequer; yet if there should be

Diversity betwixt a limitation by marriage articles to the heirs of the body of the man and the heirs female of the body of the man; and sons more favoured than daughters.

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any difference betwixt that and the present case, there might be reason to lay hold of it: now there was this diversity, in the case of *West* versus *Errissey* no portion was provided for the daughters of the first marriage; in the present case portions in all events are secured to such daughters. In *West* versus *Errissey*, after the limitation in the articles to the heirs male of the body of the husband and wife, with remainder to the heirs male of the body of the husband by any wife, came the remainder to *the heirs female of the body of the husband by the first wife*, &c. so that the daughters were more immediately in the view and contemplation of the parties in that, than in the present case.

Besides which it was observable (as Mr. Baron *Comyns* said) that in the year 1693, when these articles were made, it was usual to construe a remainder to the heirs male of the body to mean and intend the first, &c. son of the marriage; and if so, it would be reasonable to interpret articles according to the time in which they were executed; neither ought length of time to make any alteration in favour of the daughter by the first marriage, who had what was then thought and agreed upon to be a competent provision for her; that it was a material circumstance in favour of the second marriage settlement, that three of the *Mansells* (relations to the first wife) were parties thereto; from whence it seemed that by the general opinion of the relations of Sir *Thomas Powell*'s first wife, this 3000*l.* in all events was thought a sufficient provision for Lady *Price*, the only daughter by the first marriage, which might reasonably induce the Court to think so too.

[541] And by the same reason Lady *Price* would come in for the estate, she might have barred the second wife of Sir *Thomas Powell* of her jointure, if she had been living, and likewise her daughters of their pecuniary portions, which would be very hard.

Wherefore it was decreed, that Lady *Price* was not entitled to the premises in question by virtue of the limitation in the first marriage articles, to the heirs of the body of Sir *Thomas Powell* by his first wife (1).

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(1) Vide *West* v. *Errissey*, ante 349. *Hart* v. *Middlehurst*, 3 Atk. 371.

1 Eq. 584.

WHITCHURCH *versus* GOLDING.

CASE 174.

Lord Chancellor KING.

Mos. 192. 1 Eq. Ca. Ab. 14. pl. 4. In a bill purely for the discovering of a deed, or to have the deed delivered up, no need of annexing an affidavit that the deed is lost; secus if relief be prayed generally, as to recover the money on a bond. (*a*) 1 Vern. 247. 310. 1 Chan. Ca. 231. Sed 1 Vern. 59. contra.

UPON a demurrer for not annexing an affidavit, that the deed inquired after by the bill was not in the custody of the plaintiff, and upon debate of the matter, and looking into the cases in 1 *Chan. Cases* 11. (*anonymus*) and (*a*) 1 *Vern.* 180. it was ruled by *Lord Chancellor*, that if a bill be brought only for discovery and delivering up of a deed or deeds, and which prays no other relief, there it is not necessary the plaintiff should annex an affidavit that he hath not the deed or deeds in his custody; for it cannot be intended a man will bring a bill only for discovering or delivering up of that deed which he himself is possessed of; but if the bill be for relief *generally* upon any deed or bond, as to recover the money upon the bond, or the profits of land under the deed, in this or the like case, there must be an affidavit annexed to the bill, that the deed is not in the plaintiff's custody, because such a bill does by consequence seek to transfer the jurisdiction from the common law to the court of equity (1).

[542]

And note, the very next day in the case of *Saunders* versus *Stephens*, on demurrer to a bill for want of an affidavit annexed, that the deed was not in the plaintiff's custody, the *Lord Chancellor* gave the same rule, with the same diversity (2).

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(1) Demurrer over-ruled. Reg. Lib. (2) And so, *Anon.* 3 Atk. 17. *Dormer* v. *Fortescue*, 3 Atk. 132 (*z*). B. 1728, fol. 422. by the name of *Whitworth* v. *Golding*.

(*z*) *King* v. *King*, Mos. 192.

TYNT *versus* TYNT.

CASE 175.

At the Rolls. A. is principal in a recognizance of 5000*l.* and B. and C. are sureties; A. does afterwards jointure his wife before marriage in some lands, without notice either to the wife or her friends of this recogizance, and devises his real and personal estate to B. one of his sureties, and dies. First the personal estate of A. the principal shall be applied towards this recognizance, then his land devised, the devisee being a volunteer, next the paraphernalia of the wife of A. the principal, and lastly the two sureties shall contribute to make up the deficiency.

A. WAS appointed receiver of the plaintiff Sir *Haswell Tynt*'s estate during his infancy, and *B.* and *C.* were the sureties of *A.* all joining in a recognizance to the late *Master of the Rolls*, (Sir *John Trevor*) to account yearly.

TYNT *v.* TYNT. There was 3000*l.* found in arrear in *A.*'s hands, who, after giving this recognizance, settled a good part of his lands in jointure upon his wife before marriage, neither the wife nor her friends having notice of the recognizance when the settlement was made. *A.* the husband, who was the receiver, by his will devised all his real and personal estate to *B.* one of his sureties, making him his executor, and died; the plaintiff Sir *Haswell Tynt* put the recognizance in suit, upon which the widow of *A.* the receiver, who was the jointress, prayed that the personal estate of her husband might be *first* liable, and her *bona paraphernalia* exempted; 2*dly*, the land devised to *B.* the surety; and in the next place, the jointress being a purchaser without notice, that the land of the other cognizor the surety should go towards satisfaction of the recognizance.

[543] *Master of the Rolls:* It is plain, that all the personal estate of *A.* the principal cognizor ought to be first applied to satisfy this recognizance, then the land devised by *A.* to *B.* the surety, for such devisee is a volunteer, and the jointress a purchaser; but as to the lands of the other cognizor the surety, they ought to be last applied, and the jointure must be liable before these, for all the estate of the principal cognizor ought to be first subjected; and though the jointress be a purchaser, yet as she claims under the grant of the principal cognizor, she can only stand in his place, and be in no better case than he himself was, and it reasonably and probably might be an inducement for the sureties to be bound, that they saw the principal seised and in possession of so large a real estate, and the principal cognizor cannot by his own act, as against the surety, discharge any part of his real estate, which, being liable at law, ought to be so in conscience.

Mr. *Solicitor General.* If the jointress pays off the cognizee of the recognizance, and takes an assignment of it, then she may extend it at law, and the surety shall have no remedy in equity against her, she being a purchaser without notice; for though the recognizance be a record, yet in equity the purchaser is not bound to take notice of it.

Cur: This is not the case; for you neither have, nor are like to have, this assignment of the recognizance, it being made to the late *Master of the Rolls*, and the Court will hardly direct an assignment of it to load a surety. But even at law, if the jointress should get an assignment of the recognizance, and endeavour to load the sureties, then they may have an *auditâ querelâ*, insisting that all the principal cognizor's land either in

his own hands, or in the hands of any alienees, ought to be liable before any of the sureties' lands be extended. And as to the *bona paraphernalia* of the widow, though there be debts more than the personal estate will extend to pay, yet as these are liable only in favour of creditors, and not of the heir, nor of the (1) devisee, who stands in the place of the heir, and is *hæres factus;* if the lands devised be sufficient to pay the recognizance, the *bona paraphernalia* shall be enjoyed by the widow; but if those devised lands should prove insufficient, the *bona paraphernalia* must be subject before the sureties' lands shall be extended (2). TYNT v. TYNT.

(1) As against real assets *descended,* it seems, that upon the authority of *Tipping* v. *Tipping*, ante 1 vol. 730, the wife shall stand in the place of creditors for the amount of her *paraphernalia.* So *Snelson* v. *Corbet*, 3 Atk. 369. *Graham* v. *Londonderry*, 3 Atk. 393 (*z*). Sed quære, as against real assets *devised.* In *Probert* v. *Clifford,* Easter 1736. the wife's *paraphernalia,* together with the whole of the personal estate, having been exhausted in payment of the husband's debts, the question was, whether the wife should be permitted to stand in the place of the specialty creditors, so as to receive a satisfaction for her *paraphernalia* out of the real estate, which the husband had *devised,* (for it did not appear upon the pleadings that any part of the real estate had been left to *descend*). Lord *Hardwicke* said, that the Court had decreed satisfaction for *paraphernalia* out of real assets *descended,* as in *Tipping* v. *Tipping,* but that that case had gone a great way, for by the old law the wife's *paraphernalia* were absolutely in the power of the husband during his life; and that, as the Court had not in any former instance decreed the wife satisfaction for her *paraphernalia* out of real assets against a *devisee,* he would not establish the precedent; and by the decree his Lordship declared, that if the personal estate of the testator was not sufficient for payment of the debts, such deficiency was to be raised by sale of the testator's real estate liable to the specialty debts; and it was ordered that the Master should inquire whether any real assets of the testator *descended* on his heir; and if any such, then that the same, or a sufficient part thereof should be sold *in the first place,* for payment of the debts; and if that should not be sufficient, then that the *devised estates,* or a sufficient part thereof should be sold for the same purpose, and such devised estates were to contribute in proportion: And as to the claim of the plaintiff (the wife) in respect of her *paraphernalia,* his Lordship declared, that she was entitled to a satisfaction for the same out of such parts of the testator's real assets *descended upon his heir at law,* as should remain after payment of the debts. Reg. Lib. B. 1738, fol. 310. and Amb. 6. S. C.—Sed vide contrà *Incledon* v. *Northcote,* 3 Atk. 438.

(2) Reg. Lib. B. 1728, fol. 478.

(*z*) So, against a real estate charged with debts. *Boyntun* v. *Boyntun,* 1 Cox, 106.

CASE 176.

NEAL'S Case.

Lord Chancellor KING.

2 Eq. Ca. Ab. 582. pl. 3. No objection that the committee of the lunatic's person is the next of kin to the lunatic, and will come in for a share by the statute of distribution, it being for the interest of the next of kin to prolong the lunatic's life, whereby his personal estate will be increased.

Two sisters of a lunatic petitioned for the custody of her person. The petitioners were not the heir at law, but a deceased brother's son was; the lunatic's estate consisted of 700*l.* in money, and a freehold estate of 50*l.* per annum for her life only; and a niece, a deceased sister's daughter, put in a cross petition, recommending a third person to be committee.

Objected against the two sisters, that there being a personal estate, they would be entitled to a distributive share thereof within the statute, for which reason being likely to gain by the death of the lunatic, they ought not to be the committees; so that the person whom the niece recommended ought to have it rather than the sisters.

Mr. *Solicitor General:* There is not the same objection against the next of kin of the lunatic, on account of the personal estate, as there is against the heir (*a*) with regard to the real estate; for the personal estate may increase, and probably will by good management during the life of the lunatic; thus the longer the lunatic lives, it will be the better for the next of kin, consequently it is for their interest to preserve and prolong the lunatic's life, whereas the real estate cannot be increased †.

(*a*) See Judge Dormer's case, ante, 262.

[545]

And it appearing that the niece who had preferred the cross petition, did recommend a necessitous man to be the committee of the person, one who was a day-labourer and a mole-catcher, and had but a very mean cottage, with only one fireplace in the whole house, (which was an argument the niece did not care what became of her lunatic aunt) *his Lordship* granted the commitment of the person of the lunatic to her two sisters, and both parties agreed that the commitment of the estate should go to one *Bean* a neighbouring gentleman of a fair character, who was likely to manage it to the best advantage.

† The same distinction was taken by Lord Chancellor *King*, in a petition *ex parte Ludlow, Mich.* 1731, post. 638.

Ex parte PULESTON.

CASE 177.

Lord Chancellor KING.
2 Eq. Ca. Ab. 128. pl. 3.

A. took out a commission of bankruptcy against *B.* and kept it for six months without doing any thing upon it, and then executed it, and *B.* thereupon was found a bankrupt.

One sues out a commission of bankruptcy, and for six months keeps it, without doing any thing upon it; the Court, for this reason only, superseded the commission, though it was executed, and the trader found a bankrupt before any application to supersede it.

On a petition to supersede this commission, it was said by *A.* in excuse for his having kept the commission so long by him without executing it, that he was not certain at first his proof was sufficient to find *B.* a bankrupt, but it appeared afterwards there were good grounds for a commission, and that *B.* was accordingly found a bankrupt.

Lord Chancellor: It was very ill done in *A.* to keep the commission so long in his pocket, and unless, or until he had sufficient proof of the bankruptcy, he ought not to have taken out the commission, which, by having been kept so long in his pocket, may have been the means of drawing in multitudes of people to give credit to the bankrupt, and of furnishing him with opportunities of defrauding many; wherefore, for example sake, let the commission be superseded (*z*). [546]

And it being said, that this would only bring a fresh expence upon the bankrupt's estate, the charge of another commission, *his Lordship* replied, he would take care that the former commission should not be at the charge of the bankrupt's estate.

(*z*) By Lord *Loughborough*'s Order, 26 June, 1793, (2 Cooke's B. L. 281, 1 Rose, 385.) a town commission is supersedable for want of prosecution at the end of 14 days, and a country commission at the end of 28 days from the date thereof. See *Ex parte Ellis*, 7 Ves. 135. *Ex parte Freeman*, 1 Rose, 390, 1 V. & B. 34. *Ex parte Smith*, 1 Rose, 332. *Ex parte Fletcher*, 1 Rose, 454. *Ex parte Henderson*, 2 Rose, 190, Coop. 227. *Ex parte Mavor*, 19 Ves. 542. *Ex parte Knight*, 2 Rose, 319. The bankrupt himself must apply by petition, but any other person may supersede the commission by application at the bankrupt office. *Ex parte Gale*, 1 G. & J. 43.

CASE 178. *Ex parte* MARKLAND.

Lord Chancellor KING.

2 Eq. Ca. Ab. 161. pl. 6. 162. pl. 18. Assignee under a commission of bankruptcy dies very much indebted by bond, &c. and the creditors of the bankrupt petitioned that the administrator of the asignee might account before the commissioners, he having some of the bankrupt's effects in specie in his hands; but the administrator denying this upon oath, and swearing that there were debts by specialty beyond the assets, the Court thought this proper for a bill and not for a summary way of accounting before commissioners.

THE new assignees under a commission of bankruptcy taken out against *J. S.* petitioned that *J. N.* the daughter and administratrix of *J. D.* who was the survivor of the former assignees under the commission, should account before the commissioners for the effects of the bankrupt come to her hands, and an affidavit was made, that *J. N.* had confessed she believed, that her intestate the assignee kept the bankrupt's money in a separate bag, with a note in it, shewing it to be such, and also, that the assignee left lands of inheritance descended to *J. N.* the heir, which would be assets by descent, to answer the covenant entered into by the assignee for himself and his heirs, with the commissioners, duly to account for the bankrupt's effects.

[547] Against the petition I urged, that this matter was not fit to be ended in a summary way, but that a bill would be necessary to determine it; for that *J. N.* the heir and administratrix of the assignee had made an affidavit, that she never confessed the assignee her father kept the bankrupt's money in a separate bag or place, nor did she believe the fact to be so; that the assignee the father died indebted by specialty, and otherwise, several thousand pounds beyond all his assets; that she had paid some bonds, and actions were depending upon others, that it was in her election to prefer which of the specialties she pleased: and the commissioners were not proper to determine in a summary way, whether the payments already made by the administratrix, or which she should make, were or would be good and legal; or if they should make such determination, this could be no ways binding to the other creditors; therefore the order now desired, that the daughter and administratrix of the assignee shall account with the commissioners, would be of no use, since the creditors might notwithstanding bring their action, or bill in equity against the said daughter and administratrix. For which reasons *Lord Chancellor* ordered the petition of the new assignees to be dismissed, and directed them to bring their bill.

DESBODY *versus* BOYVILLE.

CASE 179.

Lord Chancellor KING.

2 Eq. Ca. Ab. 365. pl. 21. One by will gives a legacy to a daughter to be paid to her when she should attain twenty-one, or be married with the consent of his executors; proviso, that if the daughter marries without the consent of the executors, the legacy to go over; this condition, though general must yet be intended, if she marries under twenty-one sans consent of the executors; and on the daughter's coming to twenty-one, the Court will decree the legacy to her.

PETER *Boyville* by will gave to his executors some *South-sea* stock and annuities, in trust to apply the dividends thereof, for the maintenance of the plaintiff his grandaughter, until she should attain * the age of twenty-one, or be married; *and to the intent that they should transfer the said stock and annuities to the plaintiff when she should attain the age of twenty-one, or be married with the consent of* A. *and* B. But that in case she should marry *without the consent of* A. *and* B. the executors to pay her the dividends during her life, and after her death transfer the said stock and annuities to her children, and if she died without issue, then to go over.

[*548]

The plaintiff having attained twenty-one, brought her bill to have the stock and annuities transferred to her, which was opposed by the remainder-man, who insisted, that in regard the plaintiff was not married, and if she married without the consent of *A.* and *B.* (which possibly might happen to be the case), then she was only to have the dividends for her life; therefore the stock and annuities ought not to be absolutely vested in her.

Lord Chancellor was of opinion, that the plaintiff having attained twenty-one, she had an absolute interest vested in her, and the testator having expressly directed that the stock and annuities should be transferred to her when she was twenty-one, the condition annexed to her marriage must be restrained to her marriage before twenty-one; for if the stock and annuities were transferred to the plaintiff at twenty-one (as the will said they ought to be) the executors, in case she should afterwards marry without the consent of *A.* and *B.* could not after her death transfer the stock to her children, or if no issue, to the remainder-man; from whence it was plain that the testator could not intend there should be any forfeiture, but only in case the plaintiff should have married without consent under twenty-one; and therefore the stock and annuities were decreed to be transferred to the plaintiff (1) (*z*).

(1) Reg. Lib. A. 1728. fol. 396.

(*z*) So *Pullen* v. *Ready*, 2 Atk. 590. *Elton* v. *Elton*, 1 Wils. 161. And see *Lloyd* v. *Branton*, 3 Mer. 116.

CASE 180.

Ex parte VERNON.

'Lord Chancellor KING.

2 Eq. Ca. Abr. 520. pl. 4. The Court will not on motion or petition order an infant trustee to convey, unless the trust appear in writing, but in such case will leave the cestui que trust to get a decree by bill.

UPON a reference by the Court to a Master, to examine whether an infant was a bare trustee, and so to be ordered to assign over the estate within the late act of 7 *Annæ, cap.* 19. The Master reported, that the father, from whom the estate descended to the infant, had frequently acknowledged he was only a bare trustee, and proof was read, that the purchase-money was paid by Mr. *Vernon*, who devised the estate to the petitioner, but the receipt in writing had been given to the infant's father; that the *cestui que trust* and those under him had been all along in the possession of the writings and of the estate, which was 40*s.* per annum, being a burgage-house in *Whitchurch* in *Hampshire*.

Lord Chancellor: I am satisfied that this is but a trust; a resulting trust, by reason of the payment of the money by Mr. *Vernon* the testator; and as it is an estate of small value, and I hear it now said, that I have made the like order heretofore, for such a conveyance of a burgage-house in the same borough from Mr. *Vernon*'s trustee, I will in this case also, make an order (1) that the infant shall convey, since a decree will cost the value of the fee-simple of the burgage-house in question: however, where there is no declaration of trust in writing, I shall for the future leave the *cestui que trust* to bring his bill and have a decree against the infant to convey, because these orders for an infant trustee to convey, ought to be in † the plainest cases, and not in such as are subject to the disputes, which trusts without writing may be liable to (*y*).

† So held also by Lord *Talbot,* in the case of *Goodwyn* v. *Lister*, 7 *November* 1735, post. 3 vol. 387.

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(1) Reg. Lib. B. 1728. fol. 423.

(*y*) So *in Re Janaway*, 7 Price, 679. And see *Doe* v. *Martin*, 4 T. R. 50, 66. The stat. 7 Ann. c. 19, and several other statutes *in pari materiâ* are repealed, and the provisions therein contained are consolidated and amended by st. 6. G. 4. c. 74.

WALKER *versus* MEAGER.

CASE 181.

Lord Chancellor KING. Mos. 204. Where there is a devise of lands to executors to pay debts and legacies; the debts to be first paid; for this being legal assets, payment must be in a course of administration; secus in case of a bare trust to pay debts and legacies.

A. B. made his will beginning it thus: As to such effects whereof God has appointed me steward, *I charge the same with the payment of all such debts as I shall owe at my death, and also with the several legacies herein after bequeathed;* and after giving several legacies, he devised some copyhold lands which he had surrendered to the use of his will to his *eldest son and his heirs, subject to, and charged with all his just debts, and the several legacies therein before bequeathed, and made his said son executor,* who proved the will and died. Upon a bill brought by the creditors against the representatives of the son, an account of assets was decreed, and all further directions reserved until after the account taken.

Now coming on, upon the Master's report, it appeared, that great part of the personal estate had been wasted by the executor, and the rest applied in the payment of some debts; and that the copyhold had been sold to pay off a mortgage made thereof by the testator, and the remainder of the money arising by the sale was not sufficient to pay the rest of the debts and legacies.

The question was, whether the creditors should have a preference, and be first paid out of the monies arising by the sale before the legatees, or whether the creditors and legatees should be paid *pari passu?*

It was insisted for the creditors, that the testator in the beginning of his will, seemed to declare his intention, that his debts should be first paid, the words *and also* importing, that after his debts paid, the estate should be further charged with his legacies. [551]

But to this it was answered, that the words imported nothing more in the natural construction of them, than the testator's meaning, that his estate should be charged both with his debts and legacies; and though the debts were first mentioned, yet that would not give them a preference; for if so, the first legacy in a will must be first paid, then the second, and so on.

Further it was said, that where an estate is charged with debts and legacies, equity would give the preference to the debts, it being reasonable to suppose a man intended to be just, before he was bountiful, for which was cited 2 *Vern.* 405. as also the case of *Petre* versus *Bruen* in Lord *Harcourt*'s time, which was thus: a man before the statute of fraudulent de-

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vises, devised a freehold estate to his second son and his heirs, subject to the payment of his debts, and a legacy of 500*l.* And the question being, whether the debts should be preferred to the legacy, Lord *Harcourt* said he would expound the testator's meaning to be what it ought to be, to pay his debts before he was charitable, and in consequence thereof decreed the debts to be first paid. Now there was no difference betwixt that and the present case, for as here the copyhold was not liable to pay the debts otherwise than by the will, so neither was the freehold devised before the statute of fraudulent devises, unless made so by the will. Besides, what made the present case stronger in favour of the creditors, was, that the devise being to the executor, the money would become legal assets and ought to be applied, as all other legal assets, in a course of administration.

[552] To which it was replied on behalf of the legatees, that the copyhold estate not being liable at law to pay the testator's debts, it was a bounty in the testator to make it so; wherefore the creditors were really in nature of legatees; and there being no express preference given to them by the will, they ought in equity to be paid equally with the legatees.

Lord Chancellor: The words [and also] are not material, but what is most material in this case is, that the devise is to the executor, which must be taken to be a devise to him to enable him to pay the testator's debts and legacies, and this is assets; and whether legal or equitable assets, it is the same thing; for equitable assets in the hands of the executor (1) must be applied as legal assets are, first to pay debts, and then legacies; indeed if this were a bare † trust to pay debts and legacies, it might be otherwise, and the legatees might then have a right to be paid equally; but this is not the case here.

Decree the unsatisfied creditors to be paid out of the remainder of the money arising by sale of the copyhold estate in the first place (3).

† *Quære autem,* Whether it is not now the practice, in case of a trust for payment of debts and legacies, to prefer the former; and see the case of *Greaves* versus *Powell,* 2 Vern. 248 (2).

(1) Vide *Deg* v. *Deg*, ante 416.

(2) So, *Bradgate* v. *Ridlington,* Mos. 56 (*z*).

(3) Reg. Lib. B. 1722, fol. 274. and 1728, fol. 265.

(*z*) *Maylin* v. *Hoper*, Ca. temp. Hardw. 206. *Kidney* v. *Coussmaker*, 12 Ves. 154.

6. Sim. 547.

CROMPTON & al' *versus* SALE & al'. CASE 182.

Lord Chancellor KING.

1 Eq. Ca. Ab. 205. pl. 9. Husband by will gives an annuity of 10*l.* per annum to his niece A. an annuity of 10*l.* per annum to his niece B. and makes his wife executrix; the wife by will gives 10*l.* per annum annuity to the said A. and 10*l.* per annum to the said B. to begin upon the contingencies of their surviving their respective mothers; these must be intended additional annuities, and not in satisfaction of those given by the husband's will; so though not given upon such contingencies, and greater in point of duration, yet if not expressed by the wife to be in satisfaction of the annuities given by the husband's will, the Court will allow them the annuities given by both wills.

THOMAS *Boddington* by will, dated the 20th of *August* 1726, gave to his sister the defendant *Mary Potter* an annuity of 10*l.* payable quarterly during her life, clear of all taxes, and to his niece *Elizabeth Potter*, daughter of his sister *Mary Potter*, an annuity of 5*l.* to be paid quarterly during her life, and to his niece the defendant *Martha Nicholls* an annuity of 10*l.* and to her daughter *Elizabeth*, an annuity of 5*l.* the said annuities to be paid them quarterly during their respective lives, and gave to his niece the defendant *Martha Dimmock* an annuity of 10*l.* and to her daughter *Elizabeth Dimmock* an annuity of 5*l.* the same to be paid quarterly to the said *Martha* and *Elizabeth Dimmock* during their respective lives, and directed that all the before-mentioned annuities should be paid by his wife *Elizabeth Boddington* out of his personal estate tax free, and made his wife sole executrix and residuary legatee.

Elizabeth Boddington the testator's widow, afterwards made her will, dated the 6th of *April* 1728, thereby giving to the defendant *Elizabeth Potter*, daughter of the said *Mary Potter*, an annuity of 5*l.* to be paid quarterly, to hold to her and her heirs for ever, *in case she should survive her mother* Mary Potter, *and not otherwise;* and gave to the said *Elizabeth Nicholls*, second daughter of her niece *Martha Nicholls* an annuity of 5*l.* to be paid her quarterly, free from taxes, to hold to her and her heirs for ever, *in case the said* Elizabeth Nicholls *should survive the testatrix's sister* Mary Potter, to her niece the defendant *Martha Dimmock* an annuity of 10*l.* to hold to her and her heirs for ever, and to her daughter the [554] defendant *Eliz. Dimmock* an annuity of 5*l.* to hold to her and her heirs for ever; all the said annuities to be paid quarterly at *Lady-day*, *Midsummer*, *Michaelmas*, and *Christmas;* and the payments to begin at such of the said quarter-days as should first happen next after her decease; and directed that all the said annuities should be charged upon and paid out of her personal estate by the defendant *John Norman*, until a purchase could be made for the more sure payment thereof, and the testatrix directed that *John Norman* should lay out the sum

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of 1000*l.* or such other sum of money as should be sufficient to make a purchase of some freehold lands of inheritance within 50 miles of *London*, and settle the same for the more sure payment of all these annuities, which lands should only be subject to the payment thereof; but if any of the rents remained, such surplus should be yearly divided among the annuitants in proportion to their respective annuities, and appointed *John Norman* sole trustee to pay them during his life, and such other person or persons and their heirs, as he should appoint trustee or trustees to pay the same after his death, and to receive the rent of the estates so to be purchased for that purpose.

The question was, whether the annuities given by the will of *Elizabeth Boddington* to *Elizabeth Potter*, *Elizabeth Nicholls*, *Martha Dimmock*, and *Elizabeth Dimmock*, should be taken as a satisfaction of the like annuities given to them by the will of *Thomas Boddington*, (they being bequeathed by her who having her husband's personal estate, was become a debtor in respect thereof, and consequently might intend the legacies in satisfaction of such debt) or whether they should have the several annuities given to them by both the wills?

[555] *Lord Chancellor:* 1*st*, As to the annuities given by the will of *Elizabeth Boddington* to the defendant *Elizabeth Potter* and *Elizabeth Nicholls*, these being given upon the contingencies of their surviving their respective mothers, there can be no pretence to say they shall be a satisfaction of the annuities given them absolutely by the testator *Thomas Boddington*'s will.

2*dly*, As to the annuities given to the defendants *Martha* and *Elizabeth Dimmock* by the will of the testatrix, although they be of the same yearly value, and greater in point of duration than those given by the testator's will, yet as she has not declared, that the one shall be a satisfaction for the other, I see no reason why it may not be supposed the testatrix intended to be kind as well as just to her husband's relations, and to make an addition to what he had given them.

Wherefore decree (1) that the defendants *Martha* and *Elizabeth Dimmock* shall have the several annuities given them by both wills, and that the other defendants *Elizabeth Potter* and

(1) Reg. Lib. A. 1728, fol. 481, by the name of *Crompton* v. *Dymock*.

Elizabeth Nicholls, besides what is given them by the testator, shall also have the annuities given them by the will of the testatrix, if they survive their respective mothers (1). CROMPTON *v.* SALE.

(1) Vide *Duffield* v. *Smith*, 2 Vern. 258. *Chidley* v. *Lee*, Pre. Cha. 228. *Mackdowell* v. *Halfpenny*, 2 Vern. 484. *Davison* v. *Goddard*, Gilb. Rep. 65. *Meredith* v. *Wynn*, Pre. Cha. 314. *Wood* v. *Briant*, 2 Atk. 521. *Clark* v. *Sewell*, 3 Atk. 96. *Seed* v. *Bradford*, 1 Vez. 501. *Barret* v. *Beckford*, 1 Vez. 519. *Attorney General* v. *Hird*, 1 Bro. C. C. 170. *Duke of Somerset* v. *Duchess of Somerset*, 1 Bro. C. C. 309. (Note.) *Hanbury* v. *Hanbury*, 2 Bro. C. C. 352, 529 (*z*).

(*z*) *Chancey's case*, ante, 1 vol. 410. *Lee* v. *Brown*, 4 Ves. 362. *Tolson* v. *Collins*, 4 Ves. 483.

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TERM. S. MICHAELIS, 1729.

HAWKINS *versus* CROOK.

CASE 183.

At the Rolls.

Mos. 294. 383. 2 Eq. Ca. Ab. 178. pl. 4. Taking a bill pro confesso not of long standing, it having been formerly the practice to put the plaintiff to make proof of the substance of the bill though the defendant stood out to the last process. But latterly the practice has been, that if the defendant appears to a bill and stands out in contempt to a sequestration, the cause is set down to be heard, and the record of the bill produced and taken pro confesso; but if time be given to a defendant to answer, though after the sequestration, and though the answer be reported insufficient, yet the bill shall not be taken pro confesso.

THIS bill was brought by *Thomas Hawkins* brother and heir of *John Hawkins*, to set aside his brother's will dated the 1st of *December* 1727, whereby the testator had devised his real and personal estate to the defendant *Japhet Crook*, charging the same with some legacies and charities; the bill suggested, that the defendant had obtained this will by fraud and imposition.

The defendant *Crook* having appeared to the bill, stood in contempt to a sequestration for not answering; whereupon the plaintiff obtained an order for setting down the cause, to the intent the bill might be taken *pro confesso*; but the defendant having procured an order for putting off the cause for some few days, in the mean time put in an answer, to which the plaintiff took above twenty exceptions, and the answer being [557] reported insufficient as to most of these, the plaintiff served

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the defendant with a *subpœna* for a better answer; whereupon the defendant put in a second answer, which was also reported insufficient in near twenty exceptions; eighteen of which were in relation to letters written by the defendant to the testator *Hawkins*, the bill praying a discovery, whether the defendant did write such letters: and these being in the hands of the plaintiff's clerk in court, and the defendant (having been all along from the time of exhibiting the bill in the prison of *B. R.* upon account of a criminal prosecution) applied to the plaintiff's clerk in court, offering him a guinea, to bring the letters to him in the *King's Bench* prison, that he might be enabled to answer concerning them, and also petitioned the *Master of the Rolls* that the plaintiff's clerk in court might attend the defendant in the prison of *B. R.* suggesting in his petition, that he could not otherwise put in a full answer.

But this being only two days before the cause was to come on, in order to take the bill *pro confesso*, and after two insufficient answers, the *Master of the Rolls* took it to be for delay only, and refused the petition; whereupon the defendant put in a third answer, setting forth that he could not answer positively as to these several letters, having had no opportunity of seeing them, but that he did believe he wrote such letters, and also answered the other two exceptions. This answer was put in on the *Saturday*, and the cause came on the *Monday* following, when I moved that the defendant might have farther time to answer.

Because, 1*st*, The practice of taking a bill *pro confesso* is not of long standing, the ancient way being, to put the plaintiff to
[558] make proof of the substance of the bill, though the defendant had stood out to the last process, a sequestration. 1 *Vern.* 224. Sir *James Johnson* versus *Desminere*. In 1 *Vern.* 247. *Gibson* v. *Scevington*, the Court appeared to be in doubt, whether it should grant such an order; and indeed the consequence of it was extraordinary, to take every thing *pro confesso* which the fruitful fancy of a counsel could invent, suggest, or put into a bill, and make all pass for truth. 2*dly*, The reason of this order must be, that the defendant appearing and refusing to put in any answer at all, the plaintiff is by that means incapable of joining issue, and deprived of the opportunity of examining any witness; whereas when the defendant puts in an answer, though it be insufficient, yet the plaintiff has it then in his power to reply, and prove his whole bill, consequently is not without remedy. 3*dly*, There can be no precedent produced for this; and what makes the present case still the harder is,

that by this order, not only what had not been answered would be taken *pro confesso*, but even such part as was sufficiently answered; and it seemed very strange, when the *Master* said the defendant had answered all the bill, except such a part of it, and the plaintiff acquiesced under such report, that the Court should now be desired to look upon that as confessed, which the defendant in fact upon his oath had well and sufficiently denied. *4thly*, This was stranger yet, when all the parts of the bill which contained any charge of fraud had been denied, and only some letters not answered to, which the defendant being a prisoner could not see nor have access to, though the same had been left in the hands of the plaintiff's clerk in Court.

On the other side it was said, that this order for taking the bill *pro confesso* was usual, when no answer was put in, and an insufficient answer being as no answer, the order was therefore regular; that though the Court had afterwards indulged the defendant in giving him farther time, yet he having made an ill use of such indulgence, deserved no favour; and it was no answer to say, that by an insufficient answer the plaintiff is put into a condition to examine his witnesses, and prove his whole bill, since the justice of this Court was not thereby satisfied; for the plaintiff was entitled to have a discovery from the defendant, and (it might be) of such facts as could not be otherwise proved by the plaintiff; therefore it was just to say in this, as well as in other respects, that an insufficient answer was no answer. That farther, this method of equity in taking a bill *pro confesso* was consonant to the rule and practice of courts at law, where, if the defendant makes default by *nihil dicit*, judgment is immediately given in debt, or in all cases, where the thing demanded is certain; but where the matter sued for consists in damages, a judgment interlocutory is given, after which a writ of inquiry goes to ascertain the damages, and then follows the judgment final.

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Whereupon, although no precedent was cited in the case, the bill was in part read, and his Honour the *Master of the Rolls* pronounced his final decree, for the defendant to account for the rents and profits received by him, that there should be a perpetual injunction, and a reconveyance.

But an appeal (*a*) being brought from this decree before Lord Chancellor *King*, his Lordship (1) differed in opinion,

(*a*) July 1730. Lord Chancellor King.

(1) "His Lordship is of opinion and "doth declare, that the matter of the "said plaintiff's bill in this case cannot, "and therefore is not to be decreed *pro*

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observing that though in this case there was an order for a sequestration before any answer put in, yet the Court would consider how matters stood when the decree to take the bill *pro confesso* was made; it was sufficient there was at that time an
[560] answer put in, and that it was an answer, plainly appeared, nay had been admitted to be so, even by the plaintiff himself, when he sued out process for a better, since it could not, with any propriety of speech, be called a *better answer*, unless there was *some answer* put in before. That here was also a third answer, which must be admitted to be a full one, because not referred for insufficiency. Now he could not (he said) reconcile it to reason or common sense, that a defendant should be said to confess the whole bill to be true, when it appeared by the Master's report, (which was a record of the same court) that he had answered the greatest part of it, and when the plaintiff himself had taken the first answer to be an answer in part, by serving the defendant with process to put in a better.

Wherefore the decree at the Rolls for taking the bill *pro confesso* was reversed.

" *confesso* against the said defendant " *Crook* for want of an answer, because " it appears by the records of this Court, " that the said defendant hath, by leave " of this Court, put in an answer to the " said plaintiff's bill, which was accept- " ed as an answer thereto, by the plain- " tiff's putting in exceptions to the said " answer, and receiving the costs of " such insufficient answer and taking " out a *subpœna* for the said defendant " to put in a better answer, and the " said defendant afterwards put in two " other answers to the said plaintiff's " bill, and although the two first of the " said answers were insufficient in se- " veral points, yet the said defendant " *Crook*, hath thereby denied several " material parts in the said plaintiff's " bill, therefore his Lordship conceived " that the said defendant *Crook* cannot " in this case be said either to put in " no answer to the said bill, or be pre- " sumed to confess the said plaintiff's " bill, for that in several material parts " thereof he hath by his answer denied " the same, and especially as his last " answer is unexcepted to, and that if " such decree *pro confesso* were made, " it would notwithstanding his said " answer put in as aforesaid, bar him " of all manner of defence against the " said plaintiff's bill: and doth there- " fore order that the said decree for " taking the said plaintiff's bill *pro con-* " *fesso* be discharged, and that the " parties be at liberty to proceed in " this cause on the said bill and answers " according to the course of the Court." Reg. Lib. A. 1729. fol. 459. Sed vide Lord *Hardwicke*'s observations on, and objections to, this case in *Davis* v. *Davis*, 2 Atk. 21. *Lady Abergavenny* v. *Lady Abergavenny*, 2 Eq. Ca. Ab. 179. pl. 5 (*z*).

(*z*) See also *Williams* v. *Thompson*, 2 Bro. C. C. 279. *Attorney General* v. *Young*, 3 Ves. 209. *Jopling* v. *Stuart*, 4 Ves. 619. *Turner* v. *Turner*, *Bacon* v. *Griffith*, ib. in not. and Dick. 316, 474. *Hearne* v. *Ogilvie*, *Sidgier* v. *Tyte*, 11 Ves. 77, 202.

PROUD *versus* TURNER.

CASE 184.

Lord Chancellor KING.

2 Eq. Ca. Ab. 448. pl. 11.

A father advances one of his children in part, and the child dies leaving issue, then the father dies intestate; the issue of the dead child claiming a distributive share, shall bring into hotchpot what their father had received.

A FATHER had several children, and in his life-time advanced in part one of them. The child thus advanced in part died in his father's life-time, leaving issue, afterwards the father died intestate, possessed of a considerable personal estate, the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done, in regard the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than their father, if living, would have been, and had claimed his distributive share. Admitted by Mr. Solicitor *Talbot* of counsel for the children of the deceased child.

MARY GOODALL an Infant & al' Plaintiffs; [561]
CHARLES HARRIS & al' Defendants.

CASE 185.

Lord Chancellor KING.

Mos. 236.
2 Eq. Ca. Ab. 756. pl. 10.

One of the guardians of an infant girl of about nine years old, takes her from a boarding school, and marries her to his own son, who has no estate; the Court ordered the guardian to produce the girl in Court, and then committed her to the other guardian, ordering an information to be brought against the guardian who married the ward to her disparagement; but held this to be no contempt, the ward not being under the immediate care of the Court.

HENRY *Goodall* yeoman being seised in fee of a real estate of 36*l.* per annum, and possessed of a personal estate of 450*l.* by will dated 25th *January* 1723, devised all his real and personal estate to his daughter, with a devise over, in case the daughter died before twenty-one or marriage, and made the defendant *Charles Harris*, *Cowper*, and *Treacle*, guardians to his said daughter, desiring them to take care of the infant and of her estate during her minority; and the testator dying in *April* 1725, administration was granted to the guardians during the minority of the daughter.

Cowper, one of the guardians, educated the daughter under him while he lived; but he dying in *May* last, she was placed at a boarding school at *Salisbury* by the surviving guardians, and afterwards the defendant *Harris*, one of the guardians taking the infant from the boarding-school, married her (being then of the age of nine years and three months) to his own son *Francis Harris*, who had no estate, and was an apprentice to a peruke-maker.

Lord Chancellor on motion ordered *Harris* the guardian to bring into court this infant whom he had married to his son,

GOODALL *v.* HARRIS.

and that he, his son, and the infant should attend, who accordingly all attending,

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Mr. *Verney* moved, that though the defendant *Harris* was a testamentary guardian, yet having in so perfidious a manner broken his trust, and married his ward to his own son who was worth nothing, the Court of Chancery, the guardian of all infants, and which had a superintendency and cognizance of all trusts, ought to commit this perfidious guardian, and not suffer the girl, now but nine years and three months old, to continue to cohabit with her husband, who having no estate ought not to be indulged with opportunities of inveigling her, and preventing her from disagreeing to the marriage when she should come to the age of twelve years, which it would be for her interest to do; and therefore it was prayed, that the Court would commit the custody to any other person, it being doubted whether the other guardian, who was in *Wiltshire*, would take her, and it was not proper to intrust this guardian any longer with the custody of the infant.

Lord Chancellor: The infant girl never having been under the care of the Court, nor committed by the Court to the custody of the defendant *Harris*, I do not think this (*a*) an immediate contempt of the Court; but then it is a very ill thing in the guardian to marry this child to his own son, and punishable by an information; and I will have this guardian bound over with sureties to be taken by the *Master*, to appear and answer to an information to be exhibited by the *Attorney General* against him.

(*a*) Vide ante 117. Mr. Just. Eyre v. Lady Shaftesbury.

As to the child let her be delivered over by this knavish guardian to the other guardian *Treacle*, but he being at present in the country, the child shall be placed with the plaintiff's clerk in court, to be by him delivered to *Treacle*, who (it is to be presumed) will act, as he has not yet renounced the guardianship; and let it be done this afternoon, otherwise *Harris* the guardian to stand committed (1).

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(1) Reg. Lib. A. 1729. fol. 27.

TERM. S. HILLARII, 1729.

COKER *versus* FAREWELL.

CASE 186.

Lord Chancellor KING. Master of the Rolls.

2 Eq. Ca. Ab. 736. pl. 2. 1 Swan. 390. n. A witness examined at a former trial of an issue betwixt the same parties, and who has been examined in the cause, in case he dies, not only his depositions may be read, but what he swore at the former trial may be given in evidence.

ON the hearing of this cause, the *Lord Chancellor* directed an issue to be tried at the then next assizes at *Dorchester*, whether by the general words of the deed in question, the lands in question were intended to pass; whereupon at the trial, and which was by a special jury, a verdict passed for the plaintiff; but upon a motion for a new trial, it being sent by the *Lord Chancellor* to the Judge to certify, whether this was proper to be tried again, Mr. Justice *Price* did certify, "that evidence was "given on both sides, and that he should have thought this case "proper to be tried again, but that one of the witnesses ex- "amined for the plaintiff was since dead, by means whereof the "plaintiff might suffer on such new trial, and that therefore he "rather inclined against any new trial."

After which certificate, there was another motion for a new trial; and the *Master of the Rolls* being present in court, and his Lordship desiring his thoughts on this matter, his Honour said, the only objection to the new trial, appeared to be the death of the witness, and though it had been said, that the weight of [564] a living witness would be greater than depositions, yet it was his opinion, that since this witness had been examined in the cause, and was dead, the depositions might be read; also, as the testimony which the witness had given at the former trial, might be given again in evidence against the same parties (*z*), he should rather think, that the other side had suffered by the death of the witness, since they had thereby lost the advantage of cross-examining. And the Court ordered a new trial to be had at the bar of the Common Pleas, where, after a very long

(*z*) *Pyke* v. *Crouch*, 1 Lord Raym. 730. *Lord Palmerston's case*, cited in *Rex* v. *Jolliffe*. 4 T. R. 290. *Mayor of Doncaster* v. *Day*, 3 Taunt. 262.

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evidence on both sides, the jury found a verdict for the defendant, which was contrary to the former verdict.

And now a trial was again moved for; upon which it being sent back to the Judges of *C. B.* to know whether this cause was proper to be tried again, the *Chief Justice* acquainted the *Lord Chancellor*, that there had been very strong evidence given on each side, insomuch that he could not have blamed the verdict, on which side soever it had been given, and that he could not say this verdict was against evidence.

Afterwards another application was made for a new trial, when it was insisted, that this matter relating to an inheritance, it would be very hard to have the right determined by one trial, though at bar, and divers cases were cited, where new trials were granted after a trial at (*a*) bar; and this ought the rather to be done in the present case, where there had been verdict against verdict, and consequently the matter seemed to be left at large.

(*a*) See the case of Leighton v. Leighton, vol. I. 671.

But the *Chancellor* and the *Master of the Rolls* denied a new trial; saying, otherwise there would be no end of suits; that a [565] trial at bar, where more time might be allowed, and the party was put to more expence, was of greater weight than one by *nisi prius*; that the intent of the Court in sending the cause to be tried at bar was, that it might be final; but this case was the stronger, as the issue to be tried related only to the intention of the party, and not any legal title, which question might have been determined at the hearing, without ever sending it to a trial; and here being a trial at bar, this might justly claim a preference to a trial by *nisi prius*, and was sufficient to satisfy the conscience of the Court; but that still, if the party, against whom the decree was, thought he had a legal title, the Court did not debar him of that (1).

(1) Reg. Lib. A. 1729. fol. 200. by the name of *Farewell* v. *Coker*.

CASE 187.

CHAPMAN & al', *versus* MONSON & e contra.

Lord Chancellor KING.

THE plaintiffs in the original bill were occupiers of meadow and pasture ground within the parishes of *Burgh* and *Winthorp*, in the county of *Lincoln*, but did not inhabit within either of

Mos. 266. 279. 1 Eq. Ca. Ab. 367. pl. 2. Fitzgib. 119. Barnard. B. R. 292. A modus, that every occupier of land within the parish of A. living out of the parish, shall pay a penny an acre for all pasture land within the parish, but if he lives within the parish, to pay tithes in kind, a good modus.

the said parishes, and they brought their bill on behalf of themselves and others, occupiers of lands, and who did not inhabit within either of these parishes, to establish a *modus* for tithes.

The *modus*, as laid, was, that in the two parishes of *Burgh* and *Winthorp*, the Bishop of *Lincoln* for the time being was impropriator, and the defendant Mr. *Monson* lessee for three lives under the Bishop; the parishes were near the sea, and consisted chiefly of marsh-lands; and the *modus*, as to the parish of *Burgh* was, that every person not inhabiting within the parishes of *Burgh* and *Winthorp*, occupying any meadow and pasture land within the parish of *Burgh*, had time out of [566] mind paid to the appropriator of the parish, his farmer or tenant, on every *Good-Friday*, or as soon after as demanded, the sum of 4*d.* per acre every year as a *modus*, in satisfaction for all tithes, and so proportionably for every greater or lesser quantity.

And the same custom (*mutatis mutandis*) was laid for the occupiers of meadow and pasture lands within the parish of *Winthorp*, not inhabiting within the parishes of *Winthorp* or *Burgh*, that they should be privileged from paying of tithes in kind, paying a *modus* of 4*d.* per acre for every acre of meadow or pasture within the said parish of *Winthorp*, and so in proportion for any greater or lesser quantity.

The defendant Mr. *Monson* demurred to the bill, for that it appeared on the face thereof, that this was an unreasonable *modus*, as it favoured foreigners, not inhabitants within the parish, more than those who were inhabitants, and bore the chargeable and burthensome offices of the parish; also, because the *modus* was uncertain, and not permanent, and in one year tithes might be paid, and in the next a *modus*, but in the third year tithes in kind again, for which were cited 1 *Lev.* 116. and 1 *Keb.* 602. *Bawdry* v. *Bushell*, where, upon a motion for a prohibition, the whole Court held this to be an unreasonable *modus;* and particularly in *Keb.* it is said, to be an invention to cheat the parson.

Lord Chancellor took time till the next day to look into the books, and then declared he did not approve of the reason given in *Levinz*, that the inhabitants ought to be more favoured in the *modus* than the foreigners, in regard the inhabitants were liable to the repairs and vestments of the church; whereas [567] by the resolution in *Jeffery*'s case, 5 *Co.* 66. *b.* a foreigner occupying lands within the parish, though living out of the parish, is liable to the repairs, and to be taxed even to the ornaments of the church, there being no reason, but that as he is an inhabitant in one respect, he should be so in all, as to paying rates

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and taxes: and his Lordship called this a sudden opinion upon a motion, and therefore would not allow the demurrer.

Afterwards in *Hill.* term 1729, this cause coming on to be heard, *Lord Chancellor* desired to be assisted by Mr. Justice *Reynolds* and Mr. Justice *Fortescue*, who being present, and the custom being declared by the Court to be well proved, the only question was, whether the *modus* was good in law?

Lord Chancellor KING, Mr. Justice REYNOLDS, and Mr. Justice FORTESCUE.

Against the *modus* it was insisted, that as tithes are a revenue of *common right* belonging to the church, so every custom derogating from this common right ought to be taken strictly; that according to this custom, if an inhabitant of the parish of *Burgh*, occupying lands within the parish, should leave the parish, and take an house, or even a lodging in any neighbouring parish except *Winthorp*, this would entitle him to the advantage of the *modus;* so that an inhabitant by his own voluntary act, and by so slight a one, as going (perhaps) on the other side of the highway or hedge, (which possibly may be the boundary of the parish) would be privileged from paying tithes in kind; that though it should be admitted, a *modus* would be good, that every inhabitant, or occupier of lands within the parish (though not an inhabitant) should pay 4*d.* an acre for every acre of pasture or meadow land within the parish: yet
[568] (as in the principal case) for a *modus* to arise on so frivolous an account as that of leaving the parish, and taking an house or lodging in the next parish, was unreasonable, just in the same manner, as if there should be a *modus* or custom, that if any inhabitant left the town, and continued to occupy lands there, he should be entitled to the benefit of a *modus*, purely on the consideration of his having left the town, which surely would not be good; for the consideration to entitle a parishioner to a *modus*, must be something which was (originally at least) for the benefit of the parson, and therefore a consideration that the parishioner was to repair the church, would not be good; *secus* if the *modus* were in consideration of his repairing the chancel, or even the parson's pew; but the parishioners leaving the parish would be so far from being a benefit to the parson, that it would turn much to his disadvantage, by depriving him of the personal and small tithes; that every *modus* for tithe, if good, must be supposed to have had a reasonable commencement; but what reasonable cause could be assigned for the commencement of this *modus*, which so manifestly favoured mere strangers and foreigners, beyond the inhabitants of the place, and which would tempt and encourage every inhabitant to desert the town, for the sake of that prevailing motive, his

own interest, by which means the parish might become desolate, and the parson have no parishioners left to preach to. Again, every *modus* in lieu of tithes must be supposed to have commenced originally by the agreement and consent of parson, patron and ordinary; but what could be imagined to have induced the parson to consent and agree to such a *modus*, by which he might be deprived of all his parishioners, in hopes of getting an exemption from payment of tithes? Also every *modus* which conduced to fraud was an ill *modus;* see *Degg*'s *Parson's Counsellor* 308. *cap.* 16. where it is said the law so much abhors fraud in this respect, as to allow of nothing which may introduce it. In 1 *Leo.* 99. *Stebbs* versus *Goodlack*, the parson of *Letcome* in *Berks* libelled in the spiritual court against the defendant for tithes of corn; the defendant shewed a custom in *Letcome*, that the parson, as a *modus* for the tithe of corn, should have the tenth land sown with corn, and should begin his reckoning at the land which was next the church, and so the next year at the next land, &c. and insisted on this custom: the parson thereupon shewed, that the defendant the farmer by fraud and covin, every year sowed the tenth land, very thin with corn, and never dunged or manured it, so that the other nine lands, each brought forth every year thrice as much as the parson's land; wherefore in regard the defendant had abused the custom, the parson sued for tithes in kind. The farmer at first got a prohibition on account of the custom, but the parson afterwards had a consultation, *Wray* Chief Justice saying this custom was against common reason. Now if this were so, that a *modus* conducing to fraud was ill, how can any *modus* be a greater inlet to fraud, or more productive of it than this, where some of the parishioners would be continually leaving the parish, and taking lodgings in the next, to avoid paying tithes in kind, and those who staid behind, would be continually imposing on the parson by threatening to leave the parish, if he did not accept of half his dues; besides, every *modus* in lieu of tithes ought to be certain and permanent; in *Salk.* 656. *Archbishop of York* versus *Duke of Newcastle*, it is said by the Judges (though in other matters they differed) that a *modus* must be an annual profit both certain and permanent; and the words in *Deg.* 308. are, "that every *modus* must have "continuance, and cannot be good at one time, and sleep at "another." That as reason was thus against the custom, so there were two express authorities, (viz.) 1 *Lev.* 116. and 1 *Keb.* 602. and though the reason in 1 *Lev.* might go a little too far, in saying the custom ought rather to favour the pa-

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rishioners than foreigners, by reason that the parishioners were at the charge of repairing the church, whereas even foreigners were liable to be taxed for that purpose if they occupied lands within the parish; yet so far it might be urged in favour of inhabitants beyond foreigners, that they were liable to burdensome offices, as church-wardens and overseers, who by the stat. of 43 *Eliz.* are directed to be chosen yearly out of the principal inhabitants; or if an occupier of lands only was an inhabitant to all intents and purposes, then there would be no ground for the custom to make a distinction; that the custom saying, any person occupying lands, and not an inhabitant, should be entitled to the benefit of the *modus*, was uncertain, as it did not say for how long time such person should not have inhabited within the parish, whether for a week or a month, &c. Also as every person occupying lands, who was not an inhabitant, ought to pay 4*d.* an acre, and so in proportion for any lesser quantity; this (it was observed) was one farthing for every sixteenth part of an acre; but if it should be but a seventeenth part, then it would amount to a custom *in non decimando.*

Attorney General contra: As this *modus* has been uninterrupted time out of mind, so there may have been a purchaser of part of this land, who has paid the dearer for it, from a dependance upon the *modus*, and consequently, by setting aside the *modus*, the purchaser would be injured. There is no necessity that the *modus* should be permanent; in *Godb.* 194. *Brown's*
[571] case, a man had a *modus decimandi* for hay in *Blackacre*, he sowed the said acre seven years together with corn, yet this was held not to destroy the *modus*, but that the same should continue, when the acre was made into hay; also it is there said, that if the vicar be endowed of tithes of hay, the same close, when kept as meadow and mowed, shall pay tithes to the vicar, and when sown with corn, shall pay tithes of corn to the parson; by which case it appears not to be necessary, that the same land should always pay a *modus*, but may sometimes pay tithes in kind, and sometimes a *modus*, and yet the *modus* subsist. With regard to the fraud objected as incident to the *modus* in the principal case, that which every thing is liable to, cannot be a good objection against any particular thing; for this fraud may be suggested in all *modus's;* particularly in the case in *Godbolt*, the land-owner might say to the parson, if you will compound with me for tithes, I will sow the land, else I will mow it and use it for meadow, and then you (the parson) will not have the tithes, but the vicar. In the case of *Coltford* versus *Pease, Cro. Eliz.* 136. a custom was, that time out of

mind every inhabitant of *Sale*, who occupied pasture lands in *Dale*, paid tithes for these pasture lands to the vicar of *Sale*, and that the vicar paid 2*d.* for every acre to the parson of *Dale;* the Court held this a good custom, though it depended on the uncertainty of an inhabitancy, and that the vicar of *Sale*'s paying 2*d.* per acre to the parson of the other parish for this pasture, was the same thing as if this composition were paid by the occupier of the land itself, being equally beneficial to the parson. Then as to the commencement of this *modus*, the same may have been a reasonable one, since this parish of *Burgh*, having a great tract of land, it might be for the good of the land and of the parson to encourage foreigners to come, take and manure this land, by exempting them from paying of [572] tithes in kind, but still they were to pay 4*d.* per acre to the parson, which was for the parson's benefit, as it might be supposed, that otherwise the land would have laid waste, uncultivated, and yield no profit, consequently no tithes at all.

The *Lord Chancellor* and the two Judges held this a good *modus:* they admitted, that every *modus* must be certain, and if it was uncertain, no length of time would make it good; and as to a *modus* being void for uncertainty, Mr. Justice *Fortescue* cited 2 *Rol. Abr.* 265. where a prescription to pay a penny *or thereabouts* for every acre of arable land, was held void for the uncertainty; but he also cited a case (1) in the Exchequer in 1726, where there was a *modus* to pay 12*d.* an acre for up-land and 6*d.* for marsh-land, and held good. But they all thought the *modus* in the present case certain, 4*d.* per acre for every acre of pasture and meadow ground occupied by those that were not inhabitants within the parish; in which case the parson had no reason to object that the *modus* was not more extensive, that it did not extend to all the land in the parish, whether occupied by inhabitants, or by such as were not inhabitants; for that had been more to the prejudice of the parson, who, in the present case, had tithes in kind of the inhabitants for their land; and as the *modus* for paying 4*d.* per acre for all the land in the parish, (whether occupied by the inhabitants or not) had been good, *a fortiori* this was good, because more beneficial to the parson. That this *modus* was certain, because the parson was always sure of having either his 4*d.* per acre, or what was better, his tithes in kind; but by the case cited from *Godbolt*, it appeared not to be necessary, that the *modus* should every year take place; and here, whenever it should

Every modus must be certain, or else it is void, and no length of time will make it good. Thus a modus to pay a penny per annum or thereabouts for every acre, void. Modus to pay 12*d.* per acre for every acre of up-land, and 6*d.* for every acre of marsh land, good.

A modus need not be the same every year, as while the religious houses held the lands in their own hands.

(1) *Bate* v. *Hodges*, Bunb. 125.

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happen that the pasture or meadow land were occupied by foreigners, then the *modus* would certainly arise; and the same uncertainty might be objected to the custom, which said, that while the religious orders, or houses, held the *land in their own hands*, they should pay no tithes, which notwithstanding has been always adjudged a good custom; the like answer might be given to the objection to that part of the custom, where the occupier of this land was not to be an inhabitant either of *Burgh* or *Winthorp;* for if he were an inhabitant of either of those two parishes, he was to pay tithes in kind, which was still in favour of the parson. The Court admitted that every *modus* must be supposed to have had a reasonable commencement; but as to the necessity of shewing *now* that the *modus* is reasonable, that seemed not to be so clear; for these *modus's* have been from time immemorial, none can know but that there were such circumstances in those ancient times, as might have made such a composition reasonable, though at present they may not be discoverable; that it was enough to satisfy us at this time of day, that the parson, patron and ordinary, before the restrictive statutes, might bind the revenues of the parson, and that all these *modus's* must have had their commencement from an instrument signed by the parson, patron and ordinary; but there could be no colour to say, that because such instrument in so great a length of time had been lost, therefore the *modus* should be lost also; indeed so far the law went in favour of the church, as that if the instrument which the parson, patron and ordinary, had given to a layman, owner of such a farm, to discharge the farm of all tithes, (though this would be good while the instrument could be shewn) should be once lost, this being a privilege *in non decimando*, the privilege would be lost by the loss of the deed; but that in the present case, there was no ground to insist on the custom's being unreasonable; for the tithes are the reward for the trouble and care which the parson takes of the souls of his parishioners, in which case *the labourer is worthy of his hire;* but then, as the parson is not bound to go out of his parish to visit those who only occupy land within the parish, so it is but reasonable, that they who have not the benefit of the parson's care, should answer the less duty to him, and may well be excused for a *modus* of 4*d.* an acre, which the parson cannot say is too little, especially in this case, when part of his proof is, that a whole acre was let for 12*d.* or 8*d.* an acre in the times of *Edward* the First and Second, a reason for avoiding this *modus*, as being originally too much. As to the case in *Levinz*, that was

Not necessary to shew a modus had a reasonable commencement, for it might at first be so, and not now capable of being shewn at this great distance of time.

Sufficient that the parson, patron and ordinary might at first make this agreement and bind the succeeding parsons, and though the instrument of the agreement be lost, yet the modus will be good.

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observed to be a sudden opinion of the Judges, upon a motion only, and when (perhaps) only the counsel that made the motion was heard, and none of the other side; neither is the case mentioned in the other cotemporary reports; as *Raymond*, *Siderfin*, &c. Also Mr. Justice *Reynolds* asking, with regard to the parish called *Skegness*, (concerning the tithes and *modus* whereof this motion was made in *Lev.*) how the practice had been, and whether tithes in kind or a *modus* had been since paid? it was answered, that notwithstanding that opinion, this very *modus* had been observed, and tithes in kind not paid, which shewed, that no regard was had to the opinion, and that the parson was not advised to rely upon it. Lastly, the *Chancellor* and *Judges* laid great weight on four precedents in the Exchequer, cited by the counsel for the parishioners, where that Court resolved such a custom and *modus* to be good, and in some of these cases condemned the parson in costs, for contesting the *modus*, particularly 2 *Brown's Entries* 194. 197. was cited, where the pleadings of one of those cases are to be found, with a prohibition granted thereupon. [575]

Wherefore the whole Court agreeing the *modus* to be good, time was given to the Bishop till the next day to give his answer, whether he would try the custom; which the Bishop declining,

Lord Chancellor: Establish the *modus*, and dismiss Mr. *Monson*'s cross-bill for tithes in kind, without costs, in case he submit to the *modus* (1).

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(1) It is sufficient in all these cases, if the recompense to the parson in lieu of tithes be *certain to a common and reasonable intent. Hardcastle* v. *Smithson*, 3 Atk. 245. *Bennet* v. *Peart*, in Exchequer. *July* 17, 1786 (*z*).

(*z*) Reported 4 Gwill. 1272. 1 Anst. 322. (n.) nomine *Bennet* v. *Read*. See *Williamson* v. *Lord Lonsdale*, 5 Price, 25. *Blackburn* v. *Jepson*, 3 Swan. 152.

TERM. S. TRINITATIS, 1731. B.R.

1914. 2. Ch. 18.

CASE 188.

MIDDLETON WALKER, Plaintiff;
ISRAEL WOOLLASTON, Defendant.

2 Stra. 917. Fitzgib. 202. Barnard. B.R. 433.
An administrator pendente lite touching a will, may maintain actions for recovering debts due to the deceased.

THIS was a judgment given in the Common Pleas, wherein the now defendant was plaintiff, in an *assumpsit* on a promissory note brought by the then plaintiff *Woollaston*, as administrator *de bonis Nathanael' Clerk, non administrat'* by *Frances* his late wife and executrix, *pendente lite* in the Spiritual Court touching the will of the said *Frances*, in which suit in the Spiritual Court *Woollaston* the executor named in the will of *Frances* was plaintiff, against the nephews and nieces of *Frances Clerk:* the plaintiff in the Court below recovered judgment, and 52*l.* damages, upon which the defendant below (*Walker*) bringing a writ of error, and assigning the general errors:

The question was, whether an administrator *pendente lite*, where the suit in the Spiritual Court is touching the executorship, may maintain an action for recovering the debts due to the deceased?

[577] And to shew that he might, I argued as follows:

1*st*, What I shall insist upon will be the reason of the thing.

2*dly*, I shall mention such authorities as are in my favour.

3*dly*, The great inconveniences that would ensue if the law were against me in this point. And,

In the last place shall endeavour to give an answer to those cases which have been cited on the other side.

First, I presume it will be admitted, that though a man makes a will, and appoints an executor, yet if the executor be under any incapacity or disability of acting as such, he is, during his incapacity, in many respects as no executor, and therefore for that time it is considered as an intestacy. For this reason the ordinary may in these cases, during the incapacity or disability, grant a temporary administration, and such temporary administrator may sue and bring actions, as well as any other administrator to whom a complete administration is

granted. I shall instance in the common case, where an infant (under the age of seventeen years) is made executor; here, in regard the infant, by reason of the tenderness of his years, is for that time incapable of acting as executor the ordinary may grant a temporary administration to another during the minority of the infant (until his age of seventeen) and such temporary administrator may sue and bring actions. Within the same reason is the case, where upon the death of a man there is a litigation in the Spiritual Court touching the executorship to the deceased; since during this contest none can act as executor; and therefore the ordinary may grant administration to another, pending this suit, which administrator may sue, it being part of his office to recover and get in the debts of the deceased.

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I admit formerly there have been opinions (particularly in *Owen* 35.) that an administrator *durante minore ætate*) could not sue, Lord *Dyer* having held that such an administrator was but as a servant or bailiff. But I take the law, by very many cases, and by a constant course of experience to be now settled, that an administrator during the minority of an executor, though granted in the most restrictive manner, only *ad usum & commodum infantis*, may however maintain an action for a debt due to the deceased; this is admitted in 5 *Rep.* 29. *Pigot*'s case, so as the administrator makes a proper averment that the executor is under seventeen; and so is *Hob.* 251. *Carver* versus *Haslerig;* and indeed such suits are really *ad usum & commodum* of the infant executor, as they are brought in order to recover debts due to the estate. These authorities warranting an administrator during minority, &c. to sue, are carried much farther, 1 *Roll. Abr.* 888. *Wright*'s case, and 2 *Brownl.* 83. where it is adjudged, that if an administrator during minority, &c. brings an action, recovers judgment, and before execution the minor executor attains seventeen, he is so far privy to this judgment, that by a special *scire facias* he (the executor) may sue execution thereon. If then an administrator *durante minore ætate, &c. ad usum & commodum infantis*, who in some books is said to be as a bailiff or a servant to the infant executor, and in another book is called his (*a*) *curator*, may maintain an action for a debt due to the deceased; why should not an administrator *pendente lite*, (though touching the executorship) be allowed to maintain an action also, since both are but temporary administrators? one determining on the infant's coming to seventeen, and the other with the end of the suit in the Spiritual Court: why should not these temporary adminis-

(*a*) Vide Skin. Rep. 156.

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trations equally empower each administrator to sue? or rather do not all the authorities warranting an administrator during minority, &c. to sue, prove strong for us in the present case? I own, it has been a question, whether the ordinary could grant administration *durante absentiâ* of the next of kin beyond the seas, 1 *Lutw.* 342. and 4 *Mod.* 14. *Clare* versus *Hodge.* And I find in a manuscript report which I have, that the late Chief Justice *Pratt,* of counsel in that cause, objected it was a void administration, as it might end soon after granted, and yet neither the administrator himself, nor any of the debtors to the estate of the deceased know when it ended; because the next of kin might return from beyond sea, and the administrator, or the debtors of the deceased, know nothing of it; that by this means the debtors of the deceased would be drawn in to make payments to the administrator, after the next of kin's return, consequently after the administration was determined, and that such an administrator *durante absentiâ, &c.* might be discouraged from bringing any actions against the debtors of the deceased, forasmuch as such action must abate by the return of the next of kin from beyond sea before the judgment, and the administrator lose his costs. But notwithstanding these objections (which were really made, though not reported in the books) the Court adjudged such an administration granted *durante absentiâ, &c.* to be good; and the very reason given, as reported in *Lutw.* is, "to prevent the "grand inconvenience that would ensue, if the debts of the "deceased could not be recovered during the absence of the "executor beyond sea." The Court farther said, that if any [580] of the debtors of the deceased paid his debt to such an administrator *durante absentiâ, &c.* though it was after the return of the executor; yet if the debtor who paid the money had no notice of such return, it would be a good payment. Now this case proves, not only that an administration *durante absentiâ, &c.* is good, but that the chief reason inducing the Court to be of that opinion was, that by the administrator's being enabled to get in the debts due to the deceased, the grand inconvenience which otherwise might happen, would be prevented; and if an administrator *durante absentiâ, &c.* may sue, within the same reason ought an administrator *pendente lite.* The case in 1 *Salk.* 42. *Slaughter* versus *May,* not only proves that an administrator *durante absentiâ* may bring an action, but also is an express authority in this very point, that an administrator *pendente lite* touching the executorship may, if he makes a proper averment. The case was, *H.* being an administrator

durante absentiâ of *J. S.* an executor, brought an action of debt on a bond, but did not aver that *J. S.* the executor was then absent, or where he was; upon which the Court said, it was but reasonable the ordinary should have power to grant administration during absence, as well as during minority, or *pendente lite*, and that such administrator is accountable to the executor, whose absence must be intended an absence beyond sea; but the plaintiff ought to aver him to be absent. Now in this case it appears that the Court put these three temporary administrators upon the same footing; and I believe in all books, where named, they are considered as on the level, and if so, no reason can be given why an administrator *pendente lite* touching an executorship should not bring an action, as well as an administrator during minority, or during absence; nay, the allowing the administrator *durante absentiâ* to bring an action is a stronger case than the present; because there the administration may determine, and yet neither the plaintiff the administrator, nor the defendant the debtor, know any thing of, nor have any possibility to discover it; also in that case there is all the time a good executor capable of acting, who may prove the will by commission, or sue by letter of attorney; whereas the end of a suit during the pendency whereof administration is to continue, may be seen by any one at any time resorting to the proceedings in the Court where the litigation touching the executorship depended: therefore all these authorities which warrant actions to be brought by an administrator during the absence of an executor, are just so many authorities for me; and the case of *Slaughter* versus *May* mentioning that of an administrator *pendente lite* touching an executor, is an authority in the very point. In *Gibson's Codex Juris Ecclesiastici Anglicani* (*page* 574,) these three temporary administrations are taken notice of, and put upon the same footing; besides which, is added, "that "though there be no suit or controversy depending touching the "executorship, and though there be an executor, yet if he does "not come in, the ordinary may grant a temporary adminis- "tration until the executor comes in and proves the will." Also it is held, that if an executor afterwards becomes lunatic, and thereby disabled from acting, there, for necessity's sake, the ordinary may grant a temporary administration with the will annexed; this I remember was said by *Holt* Chief Justice, in the case of *Hills* versus *Mills*, reported short in 1 *Salk.* 36. but that otherwise it was if an executor became a bankrupt, because there being no disability in such case, no temporary administra-

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tion could be granted: but of very little use would all these temporary administrations be, if by virtue of them the debts of the deceased could not be recovered.

[582] It is objected, that no administrator before the statute of 31 *Edward* 3. *cap.* 11. could bring an action, and that the statute empowering an administrator to sue, does not extend to one *pendente lite.*

Resp. All these temporary administrators are equally out of the statute, and in such administrations the ordinary is not bound to grant them to the next of kin, as was held *Hob.* 250. *Bryers* versus *Goddard,* and 1 *Vent.* 219. *Thomas* versus *Butler;* but if an administrator during the minority or absence of an executor may sue, though out of the statute, why may not an administrator *pendente lite* sue also? I take all these temporary administrators to be within the reason and equity of the statute of *Edw.* 3. as they *are deputed by the ordinary,* which are the very words; and since in all those cases the deceased dies for the time, and to some purposes, intestate, there is then no person to act as executor.

Now I will consider the very great and manifest inconveniences which would ensue, if an administrator *pendente lite,* touching an executorship could not bring actions to recover the debts of the deceased.

Suppose these consisted only, or chiefly, in outstanding debts, owing on hazardous securities, or from persons in doubtful circumstances, in apparent danger of being lost, if not sued for in time; would it not be an irreparable loss to the estate, and to the creditors of the deceased, if for want of a power given by law to the administrator *pendente lite,* all those debts should be lost? suppose the chief part of the estate consisted of debts in trade, as book debts, which are simple contract and liable to be barred by the statute of limitations, and that the six years have begun to incur in the life-time of
[583] the deceased, and consequently must run on; would it not be a thing of the most mischievous consequence, and render the law extremely defective, if the administrator *pendente lite* were not allowed to sue for these book-debts, in order to prevent them from being barred by the statute, and thereby secure the estate of the deceased, and perhaps save his creditors from being ruined? The other side, in this case, are endeavouring to make a very nice difference, where really there is none, betwixt an administrator *pendente lite* and other temporary administrators; and yet to what purpose is this extreme nicety to be supported? why, only to introduce great and public mis-

chief. On the other hand, there can be no inconvenience in allowing this administrator *pendente lite* to sue for the debts of the deceased; the hand of the administrator who is to recover them, must be supposed safe; this Court may so far take notice of the spiritual courts, as to be sensible that these temporary administrators give security there proportionably to the value of the estate of the deceased, or, if that were out of the case, every person is *prima facie* intended by law of sufficiency to perform his trust, and not to be insolvent, *nihil nequam præsumendum;* and whatever such administrator does receive of the estate of the deceased, he must be accountable for to the executor when he shall have proved the will. Besides, as this administrator is allowed to be sued, why should he not also be allowed to sue, why should it not be mutual, especially since the allowing him to sue is the only way to enable him to answer the suits brought against him? I must own, that an executor *de son tort* may be sued, and yet cannot sue; for as he comes in entirely by wrong, and as a tort-feasor, he shall have none of the privileges of a rightful executor: but in the present case, our administrator *pendente lite* cannot be said to come in by wrong, when he is constituted by the act of the [584] Court, of that Court too, which has a proper jurisdiction in granting administrations. It will be admitted, that an administrator *durante minore ætate* of an executor, though it be but *ad usum & commodum infantis*, may yet sell *bona peritura*. And the like power will (I presume) be allowed an administrator *pendente lite*, and why is this, when such administrators can sell no other goods? surely for the sake of necessity, and to prevent these *bona peritura* from being destroyed; and is there not the same necessity to take care of hazardous debts, and prevent debts by simple contract from being barred by the statute of limitations? do not they require the same care to secure them from being lost, as *bona peritura* do? yes certainly, as probably the debts are of a much greater value than the goods. The spiritual courts have of late come into this way of granting temporary administrations, and my Lords the Judges have been pleased to allow them good in law, though out of the statute which permits, nay requires the ordinary to grant administration; and this the courts of common law have done for the ease and convenience of the subject, which is indeed the chief end of all laws. But it would very much lessen and take off from the use and benefit of these administrations, if it should be adjudged, that none by virtue thereof were capable of suing for and recovering the debt of the de-

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ceased: this construction would reduce the grant of letters of administration *pendente lite*, to no more than letters *ad colligendum bona, &c.*

And now, as to the authorities which have been cited on the other side; though I here beg leave to premise, that nothing less than solemn resolutions, such as are founded on good reason, ought to be sufficient to introduce so great an inconvenience; whereas (as I take it) among all the authorities cited against us, there is not one case adjudged on the point.

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As to *Moore* 636. *Robin*'s case, (*Trin.* 43 *Eliz.*) it was thus: two executors contest in the spiritual court, whereupon the ordinary grants administration *pendente lite*, and it seemed to the Court (*semble* says the book) that he could not do it; these are all the words of the case; but here was no judgment, nor any reason given in support of the opinion; and to overbalance this authority, I would quote against it the case of *Slaughter* versus *May* in *Salk.* 42. and the reason given in 1 *Lutw.* 242. for the resolution in *Clare* versus *Hodge;* here are two authorities to one which say it is a great inconvenience where none can sue for the debts of the deceased; and as they are the latter, so are they the better authorities. As to *Carthew*'s *Rep.* 153. *Frederick* versus *Hook*, that was an action of debt on a bond brought by the plaintiff *Frederick*, on a special administration *quoad* the bond, *pendente lite* concerning the last will of the Lady *Frederick;* the defendant pleaded in abatement, that the Lady *Frederick* made her will, and thereby constituted the plaintiff her executor, and that the plaintiff *suscepit super se onus executionis testamenti prædict'*, and prayed the judgment of the Court, for that the plaintiff brought his action as administrator and not as executor; upon which the plaintiff demurred; the Court held that the administration granted *pendente lite* in the spiritual court concerning a will was utterly void, and that the difference was, where there is a controversy in the spiritual court concerning a *right of administration*, and where it is concerning a *will*, as in that case; that in the first the administration granted *pendente lite* is good, but otherwise where the controversy is concerning a will, for he who comes in under a will shall avoid all which an administrator can do, and then it is said in the end of the case, that the plaintiff proceeded no farther in that action: now it is plain upon the words of the book, that this case was never adjudged, but the objection started upon the demurrer; and at that time the Court held the administration granted *pendente lite* touching the will void, whereupon it is said, that the plaintiff proceeded no

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farther in that action; and possibly he had no occasion; the defendant in so plain a case as that of debt on bond, having gained some time by his plea, probably paid the money, or it may be, the will of Lady *Frederick* was soon afterwards proved, and so the objection removed; but this is not mentioned, only so far appears, that no judgment was given in the case. In the next place it is observable, that this very authority allows an administration granted *pendente lite* touching an *administration* to be good; whereas this temporary one is as much out of the statutes enabling the ordinary to grant administration, as any other temporary administration whatever, and so this very case cited on the other side, answers one of the objections which they make: but the reason is very slight which is given by the book to make a difference betwixt an administration granted *pendente lite* touching an administration, viz. that this is good; but that an administration granted *pendente lite* concerning a will is void; why? because he that comes in under the will shall avoid all that an administrator *pendente lite* can do; now this is no reason at all; all that can be meant by it is but this, that an executor shall avoid any grant, assignment, or release made by an administrator *pendente lite* of any part of the deceased's estate, if made to his prejudice; but the administrator's suing for debts due to the deceased, and preventing their being lost by the debtor's becoming insolvent, or from being barred by the statute of limitations, is a service and can be no prejudice to the executor. The administrator *pendente lite*, as soon as he receives a debt, is accountable for it and must pay it over to the executor; it cannot surely be intended, by this reason of the executor's avoiding all acts of the administrator *pendente lite*, that if such administrator recovers judgment against a debtor of the deceased for a debt due to him, and takes out execution, that the executor shall avoid all this, and make the debtor pay the debt over again, which he was before compelled to pay by course of law, and which the executor is at liberty to receive at his pleasure from the administrator *pendente lite*; this would be doing a great hardship without the least occasion.

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Or, putting this case farther; suppose the administrator *pendente lite* had got judgment against a debtor of the deceased, and had thereby secured the debt, but before any execution sued, the executor had proved the will, whereby the administration *pendente lite* had determined, could this any ways prejudice the executor? No; so far from it, that (as I take it) the executor when he has proved the will, may take advantage

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of this judgment, and bring a special *scire facias* in order to sue out execution on it in the same manner as an infant executor, having attained seventeen, may sue out a special *scire facias* upon a judgment recovered by an administrator during the minority of the executor, which has been adjudged; so that the reason given why the executor shall avoid any act done by the administrator *pendente lite*, can only relate to grants, assignments or releases made by such an administrator to the prejudice of the executor; whereas all those which are done for his benefit shall stand.

[588] The other case is that of *Smith* versus *Smith*, cited by Serjeant *Carthew*, in his report of the former of *Frederick* versus *Hook*, from 3 *Keb.* 54. and this I admit to have been adjudged; but however, it will not (as I apprehend) appear to be material to the present question; there the plaintiff brought trover as executor for the conversion of some goods, and on not guilty pleaded, the jury found a special verdict, that the plaintiff was the executor named in the will of *J. S.* that the goods in question were the goods of *J. S.* and that the defendant in the action of trover had administration granted to him of the goods of *J. S. pendente lite* touching the will; adjudged for the plaintiff in trover, because the administration was merely void; and the book says, that this judgment was also given upon the distinction above-mentioned. Now that this judgment was very right and just I freely allow; but that the same was given upon the distinction betwixt an administration *pendente lite* touching a will, and an administration *pendente lite* touching an administration, I can hardly think; all determined in this case is, that the property of the goods of the deceased was in the executor, and not in the administrator *pendente lite*, which I admit: for so in the case where an administration is granted *durante minore ætate* of an executor, the property of the goods is in such infant executor; and therefore an administrator during minority cannot sell any of the goods, which he necessarily might do, if he had the property. But it is plain, that an administrator *durante minore ætate* may sue for the debts due to the deceased, though he cannot assign or sell any of his goods; and therefore this case only shews, that an administrator *pendente lite* is upon the level with an administrator during the minority of an infant executor, which I do not controvert. So that upon the whole, as the

[589] principal case in Serjeant *Carthew*'s Reports of *Frederick* versus *Hook* is not adjudged; and as the reason given for the opinion of the Court rather weakens its authority, and that cited there

and reported in *Keble*, of *Smith* versus *Smith*, though adjudged, is not to the purpose; I humbly apprehend, that from the reason of the case now in question, which is strong for us; from the very great mischief and inconvenience that would follow, if an administrator *pendente lite* could not sue and recover debts due to the deceased, to the great loss of his creditors, and perhaps to the ruin of the estate; as there is not one adjudged case against us, and on the other hand several in our favour determining that a temporary administrator may sue; and in the last place, as there are others that put all these temporary administrators upon a balance, or upon the same footing, I am to pray that the judgment given in *C. B.* may be now affirmed.

Whereupon the Lord *Raymond* Chief Justice, *Page* and *Probyn* Justices were of opinion for affirming the judgment; and that the ordinary had a power to grant administration *pendente lite*, though touching an executorship; that the reason of the ordinary's having a power to grant administration *durante minore ætate* of an executor was, because during the infancy of the executor there was no person capable of suing or recovering the debts of the deceased; that *pendente lite* there being no executor that can sue, such case is within the same mischief, which would be attended with very great inconveniences, for the reasons that had been given; that the case of an administrator during the absence of the executor was stronger, there being an executor capable of acting, who might by commission prove the will, and sue by attorney; that all these temporary administrations, though out of the statutes of *Edw.* 3. and *Hen.* 8. were yet allowed to be within the equity of those [590] statutes for the ease and convenience of the subject, which ought to be considered; that in the cases cited from *Moor* and *Carthew* there was no judgment; and the reason given in the latter of those books, did not maintain the opinion.

But *Lee* Justice doubted; for he said, an administration *pendente lite* touching the executorship seemed to differ from administrations *durante minore ætate*, or *durante absentiâ* of an executor, because in the two last cases the administrations were granted *cum testamento annexo*, which cannot be done when the will is in controversy; *& adjorn'*. But judgment was afterwards affirmed with the concurrence of Mr. Justice *Lee* (1).

(1) So, *Wills* v. *Rich*, 2 Atk. 285 (*z*).

(*z*) See *Adair* v. *Shaw*, 1 Sch. & L. 191. *Atkinson* v. *Henshaw*, 2 V. & B. 254. *Gallivan* v. *Evans*, 1 Ba. & Be. 85. *Ball* v. *Oliver*, 2 V. & B. 96.

CASE 189. *Ex parte* AISCOUGH.

Lord Chancellor KING.

2 Eq. Ca. Ab. 780.
Mos. 391.
Writ de ventre inspiciendo.

UPON a petition for a writ *de ventre inspiciendo* the case was: Sir *John Chaplyn* Bart. a young gentleman of about the age of nineteen, seised of a great real estate in *Lincolnshire*, was drawn in by one *Morris* a bailiff, who lived in *Clare-Market*, to marry his daughter, an infant about sixteen, and after the marriage Sir *John* was prevailed upon to make his will, and thereby to devise all his personal estate to his wife; within two months after the marriage Sir *John* died, leaving three sisters, who were his heirs at law, in case of no issue by this marriage.

The widow pretending to be with child, the three sisters petitioned for a writ *de ventre inspiciendo*, insisting by their counsel, that this was a writ at common law, a matter of right, and especially proper in the present case, where the petitioners' family had been twice imposed upon already, first by the improvident and unequal marriage, and afterwards by the will, which gave all the testator's personal estate to this *new* wife, from whence there was great room to suspect another fraud might be put upon the family by a false and supposititious child, and so the sisters and next heirs be deprived of their right to the inheritance; and for this purpose 1 *Inst.* 8. *b.* *Cro. Eliz.* 566. *Moor* 523. *Willoughby*'s case, and *Cro. Jac.* 685. *Theaker*'s case, were cited, but more particularly the *Solicitor General* insisted on the case of the *Attorney General* versus *La Roche*, determined by the *Master of the Rolls* about six years since, where one by will gave a sum of money to be laid out in land and settled on * *A.* (who was an extravagant person) for life, remainder to his first, &c. son in tail male, remainder to his daughters in tail general, remainder to a charity: *A.* married a woman of an ill reputation, and dying soon after, the wife pretended to be with child; whereupon the *Master of the Rolls*, in order to preserve the charity from any false and supposititious child, decreed the Master to appoint two midwives, who should resort to the widow, search her, and see whether she was with child or not, and attend at the birth; and that afterwards, there being an attendance on the Master in relation to this cause, the widow perceiving the matter would be discovered, voluntarily came before the Master, and declared that she was not with child; by which means the right to the money was preserved for the charity.

The effect of this writ decreed upon a bill in equity, where a sum of money was devised to a charity on the death of A. without issue, A. dying and leaving a widow of ill fame, who pretended to be with child.

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The petitioners in the principal case farther prayed, that whereas the widow was now at her late husband's seat in

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Lincolnshire, this might be as her (*a*) castle, wherein she should be confined and continue until the time of her delivery, and that some woman might be always resident with her both before, and at the birth.

(*a*) Vide 1 Inst. 8. b.

Against which it was urged, that here was no crime in Sir *John* the infant's marrying *Morris*'s daughter, or in her being married to Sir *John*, who was of age to choose a wife for himself, and who might think beauty and virtue a sufficient portion, especially when his fortune had put him above the want of money; that here was not the least imputation on the lady's character; that as it had not appeared any fraud or collusion was intended, it was very unreasonable to suspect she would be guilty of imposing a false child on the family; also, that the other side ought to have proved Sir *John* died seised of some lands in (*b*) fee-simple, whereas it was reported that by a family settlement the estate was entailed; that it would be an hardship on a lady of so tender years to send a jury of matrons to inspect her; and she being now with child, might be of dangerous consequence, and occasion a miscarriage, a thing possibly wished for by the other side; however it was hoped the Court would not grant this writ unless there was just reason for it; then with regard to her staying at the seat in *Lincolnshire*, it was represented to be an old house much out of repair, and that she having no friends or relations in that neighbourhood, it would be cruel to force her to continue there; also affidavits were read, proving she was with child, which fact was not disputed.

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(*b*) Vide 1 Inst. ubi supra.

Lord Chancellor: I take this writ *de ventre inspiciendo* to be of common right, it is in the *register*, though not in *F. N. B.* and is for the security of the next (1) heir, to guard him or her against fraudulent or supposititious births; as to what is objected, that the petitioners are entitled only to an estate-tail, this, at the time the writ was first allowed, being a qualified fee, is sufficient; besides, any affidavits proving that Sir *John*

Held to be a writ of common right, being to secure the next heir from a fraudulent and supposititious birth, and lies for a tenant in tail, because at the time it was first allowed, an estate tail was a fee simple conditional.

(1) This writ is now granted, not only to an heir at law, but to a devisee, whether for life, or in tail, or in fee. *Ex parte Bateman*, at the Rolls, 16 *December*, 1784. *Ex parte Bellett*, at the Rolls, 20th *December*, 1786 (*z*). *Ex parte Brown*, in Cha. Trin. Term 1792 (*y*).

(*z*) 1 Cox, 297.

(*y*) *Ex parte Wallop*, 4 Bro. C. C. 90.

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A widow being admitted to be with child, the Court will fix a place agreeable to both parties, where she shall be till delivered, and where the heir may from time to time, at proper seasons and on notice, send women to see her, and to be present when the child is born; and in such cases no need to execute the writ in a strict manner.

was in possession of land, will induce me *prima facie* to intend it a fee-simple; but as it may be an hardship to oblige the lady to live in *Lincolnshire*, far from any of her friends and relations, and since the marriage appears to have been but in *March* last, consequently no probability of her being brought to bed before *Christmas*, and as her father consents that she shall be in town before *Michaelmas*, and reside in St. *James*'s parish in *Middlesex*, let the writ *de ventre inspiciendo* issue at *Michaelmas*, directed to the sheriff of *Middlesex*; in the mean while the present * heirs may send two women at seasonable times, to see whether she is with child, they giving reasonable notice before hand, so that this may be attended with as little inconvenience as possible to the young lady.

[*594] *Note*, The first writ is to see whether the widow be with child & *quando paritura*; and if the jury find her with child, then she is to be removed by a second writ issuing out of *C. B.* (where the first is returnable) to a castle where the sheriff is to keep her safely; *vide Cro. Jac.* 685, 686. But in the principal case, the *Lord Chancellor* said, there was no occasion to execute the writ in that strict manner, provided people of skill had from time to time free access to her, and might be present at the birth.

CASE 190.

4. Mich. 10 Geo. 663.

Post. Vol 3. p 223.

GEORGE VERNON, Esq. and SIR CHARLES VERNON, Knt. (younger Sons of Sir Thomas Vernon deceased) and CHARLES VERNON and THOMAS VERNON Infants, the two Sons of the said Sir Charles Vernon, by their Father and next friend. } Plaintiffs;

JANE VERNON, Widow, Executrix of Thomas Vernon, Esq. deceased, who was the eldest surviving Son of the said Sir Thomas Vernon, and was Executor of his eldest brother Henry Vernon deceased, } Defendant.†

Lord Chancellor KING.

THIS bill was for a specific performance of marriage articles, whereby *Thomas Vernon* the defendant's late husband and

Kel. in Cha. 9. 2 Eq. Ca. Ab. 28. pl. 33. Covenant in consideration of a marriage to settle lands of 350*l.* per ann. on husband and wife and the issue male of the marriage, remainder to the brothers of the husband; equity will compel an execution of this covenant, and not put the party to an action of covenant in the trustee's name.

† This and the precedent case are misplaced in point of time, one having been determined in Trin. 1730, and the other in Pasch. 1731.

testator covenanted *inter al'* to purchase lands of 350*l.* per annum, and settle them on himself for life, remainder to his wife the defendant for life, remainder to their first, &c. son in tail male, remainder to the heirs male of the body of the said *Thomas Vernon* by any other wife, remainder to his brother the plaintiff *George Vernon* for life, remainder to his first, &c. son in tail male, remainder to the plaintiff Sir *Charles* in like manner, remainder to himself in fee.

The bill set forth, that *Henry Vernon*, eldest brother of the said *Thomas*, having acquired a considerable personal estate in *Turkey*, by his will, after some legacies, devised the residue, being about 10,000*l.* to his brother the said *Thomas Vernon*, and in case he died without heirs male of his body, then to his two brothers, the plaintiffs *George* and Sir *Charles Vernon*, to be equally divided between them; soon after which the testator *Henry* died a bachelor.

That afterwards the said *Thomas Vernon*, the next brother of the testator *Henry*, intermarried with the defendant *Jane*, and by articles made before marriage dated the 6th of *September*, 1695, it was agreed, that the said *Jane* (then *Jane Stile*) should convey her inheritance in or near *Crawley* and *Cobham* in *Surrey*, to the use of him the said *Thomas* her intended husband for his life, remainder to herself for life, remainder to their first and every other son in tail male, remainder to their daughters in tail general, remainder to *Thomas Vernon* in fee; in consideration whereof, and of the said marriage, as also of 1500*l.* in money, *Thomas Vernon* covenanted to purchase lands of 350*l.* per annum, and settle them on himself and his wife *Jane* for their lives, remainder to their first and every other son in tail male, remainder to the heirs male of the body of *Thomas Vernon*, remainder to the plaintiff *George Vernon* [596] for life, remainder to his first and every other son in tail male, remainder to the plaintiff Sir *Charles Vernon* for life, remainder to his first and every other son in tail male, remainder to *Thomas Vernon* in fee; to which articles Sir *Thomas Vernon* the father was a party, but neither gave, nor covenanted to pay or settle any thing upon the marriage.

Soon after the marriage was solemnized, and *Thomas Vernon* having omitted to settle any lands to such uses as were agreed to be limited by the articles, devised all his real and personal estate to the defendant *Jane* his wife and executrix, charged with portions for his three daughters, and in *August* 1726 died without issue male: whereupon

His two brothers the plaintiffs now brought their bill for

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a specific performance of these articles, (viz.) that lands of 350*l.* a year should be purchased and settled agreeable thereto.

For the plaintiffs it was insisted, that *Thomas Vernon* having solemnly on his marriage covenanted to make this settlement to his own brothers, and upon that inducement the father having come into the articles, and as it was a reasonable covenant in itself, so it was just Mr. *Vernon* should be compelled to make it good, and settle lands in manner as aforesaid; that it was to be presumed Mr. *Vernon*, the defendant's late husband and testator, entered the more readily into the agreement in order to make some satisfaction for the advantage accruing to him by the void devise over of his brother *Henry*'s personal estate, in case of failure of issue male of his body, to his two brothers the plaintiffs *George* and Sir *Charles Vernon*; also that the defendant *Jane* herself had by letters, after her husband's death, promised to perform his marriage articles in purchasing and settling lands accordingly: and several cases were cited in behalf of the plaintiffs, particularly that of (*a*) *Osgood* and *Strode*, determined first by Lord *Macclesfield*, and afterwards affirmed on a re-hearing by Lord *King*, where a covenant for settling lands on a nephew, in default of the son's dying without issue male, was decreed to be carried into execution.

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(*a*) Ante 245.

For the defendant it was urged, that the covenant as to the plaintiffs the brothers of *Thomas Vernon*, was merely voluntary, not within any of the considerations expressed in the articles, which were that of marriage, of the wife's covenanting to settle her inheritance, and the pecuniary portion of 1500*l.* which she brought, and that these being all express considerations, no other could be intended, *expressio unius est exclusio alterius*; that in *Bedell's* case, 7 *Co.* 40. it is said, if the father in consideration of 100*l.* paid by his son, covenants to stand seised to the use of the son, this deed must operate as a bargain and sale, and be enrolled, though in case of a son, by reason of the express consideration; and so here no consideration could be intended but what appeared, which case was the stronger, as the usual clause, (viz.) *and for divers other causes and considerations*, is omitted in the deed: that if by a different deed, and not by these articles, *Thomas Vernon* had covenanted to settle lands of 350*l.* per annum, without any consideration, equity would not have compelled him to perform it; and as a *nudum pactum* would not bind at law, so neither would a covenant if voluntary, and without a con-

sideration, oblige in equity; besides, this remainder to the plaintiff's brothers was not only voluntary but entirely precarious, in the power of *Thomas Vernon* to have barred at [598] his pleasure, by a common recovery, as soon as made; and it must have been intended that he should never be sued for a performance of it, since the very suit would be a provocation to him to bar the remainder when settled. That as to Sir *Thomas Vernon*'s being made party to the articles, it could not be material, because nothing moved from him, nor did he undertake to pay or settle any thing; and if it was an objection against the defendant, that Sir *Thomas Vernon* was a party, it was surely as material an one against the plaintiffs, that they were *not* parties to the articles. That the plaintiffs seemed conscious a consideration was necessary, by their endeavouring to bolster up this covenant, and make it as a consideration, that it was done by Mr. *Vernon* with design to make satisfaction for the personal estate settled by *Henry Vernon*'s will on the plaintiffs, in case he (*Thomas Vernon*) should die without issue male, which from the remoteness of the limitation vested absolutely in him; whereas the answer to this was easy, (viz.) that such will was either good, in which case the plaintiffs might take advantage and make the best of it; or void, and then it was out of the case. That as to the letters sent by the defendant *Jane* just after the death of her husband, when overwhelmed with grief, and at best not knowing the law, these were said to be explained by the evidence of her brother *Hornby*, to mean no more than that if she was obliged by law to do this, she would not put her husband's brothers to the expence of a suit, but that she had been since advised the covenant, being voluntary as to them, was not binding; that as to the case of *Osgood* and *Strode*, cited on the other side, where there was a covenant for settling lands on a nephew in default of the son's dying without issue male, that could not be called a voluntary covenant, the father who joined in the settlement having an equitable interest in part of the lands settled, and it might well be presumed he [599] would not have joined, unless a remainder had been limited over to the son of his second son, which was the very reason (*a*) given by the Lord *Macclesfield* in pronouncing that decree; whereas there was no such ingredient to be found in the present case, the father, though party to the articles, contributing nothing on the marriage; wherefore all that equity could do, would be to decree that the plaintiffs should have liberty to bring an action of covenant in the trustees' names against the

(*a*) Ante 256.

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defendant the executrix of *Thomas Vernon*, in order to recover damages.

Reasons why equity should not put the party to sue the covenant at law in an action brought in the trustees' names.

Lord Chancellor: As to what has been said of putting the plaintiffs to sue the covenant in the names of the trustees in the marriage articles for the recovery of damages, I do not think it an adequate remedy; the party who would be entitled to the greatest share of the damages, would (in case any such were living) be the plaintiff *George Vernon*'s son, as having the first estate tail; but there being as yet no such son, I do not see how he would have any part of the damages given in the action of covenant, were it to be brought; also Sir *Charles Vernon*'s eldest son may die without issue, and then the second son may be entitled to the first estate of inheritance in the premises to be purchased, who yet cannot come in for any part of the damages recovered in the covenant: but if I decree a specific performance, and a settlement to be made according to the agreement, then each party entitled, or to be entitled, will have right and justice done them, if not before barred by a legal conveyance, (viz.) by a common recovery. With regard to what has been mentioned of Mrs. *Vernon*'s letters, it is true these ought not to bind her, if not bound before by the articles; she might well be under
[600] an apprehension of being liable by means thereof, and therefore write such letters; but that would be no reason for her being concluded by her misapprehension. There is no pretence of any fraud or imposition on Mr. *Vernon* in the obtaining this covenant from him, on the contrary, it appears to have been made upon the most solemn occasion, that of his marriage; and to be an agreement, which not only his own but also his wife's relations came into; wherefore as he has in so solemn a manner entered into it, I do not think he himself could have been admitted to say *I will not perform it*, and if so, his executrix, who stands in his place, cannot be more favoured.

Mr. *Vernon* might be induced to come into this covenant, in order to make some recompence for what was intended the plaintiffs by their elder brother *Henry*'s will, I mean the devise over of the personal estate to them in case their brother *Thomas* should die without issue male, which has happened; he probably did not at first know such devise over to be void in law; indeed none but a lawyer could know it; and though he might afterwards be advised it was void, yet as this was the intention of his brother expressed in his last will, he may have thought himself in conscience bound to make some satisfaction;

and for this, or some other good reason, as for the support of his name, have entered into the covenant. Farther, no creditor can here be hurt by a specific performance of this agreement; wherefore as the defendant has admitted assets, let her purchase and make a settlement of lands of 350*l.* per annum pursuant to the articles, and the Master settle the conveyance if the parties differ (1).

As to costs, it seems this was so doubtful a case, that they were not so much as asked for by the plaintiffs. [601]

Upon appeal to the Lords this decree was (*a*) affirmed (2).

(*a*) In March 1731-2.

(1) Vide *Osgood* v. *Strode*, ante 245. *Goring* v. *Nash*, 3 Atk. 186. *Stephens* v. *Trueman*, 1 Vez. 73.

(2) 4 Bro. P. C. 26.

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CASE 191.

Lord Chancellor KING.

SIR *Thomas Doleman* the father, upon a settlement made on his marriage, had a power to charge the manor of *Shaws* in *Berks* with 1000*l.* and in case of non-payment, the said manor and premises were limited to the use of trustees and their heirs, until this 1000*l.* and interest should be paid, subject to which charge the manor, &c. were by that settlement limited to the first, &c. sons of Sir *Thomas* in tail male.

Sir *Thomas Doleman* made an appointment of the 1000*l.* unto *J. S.* under whom the three children of *Lewis Doleman*, second son of Sir *Thomas*, (viz.) *Thomas-Humphrey Doleman Lewis* and *Dorothy Doleman*, became entitled to 400*l.* equally to be divided amongst them, this 400*l.* being said to be part of the 1000*l.* Afterwards Sir *Thomas Doleman* died leaving issue two sons, Sir *Thomas* and *Lewis*; *Lewis* died leaving issue the said *Thomas-Humphrey*, *Lewis* and *Dorothy*; Sir *Thomas Doleman* the son suffered a recovery to the use of himself in fee, (*Qu.* if the freehold was not in the trustees for raising the money appointed to be raised by Sir *Thomas Doleman* the father, and consequently no good tenant to the *præcipe*,) and by his will devised several annuities, particularly [602] 100*l.* per annum to one *Elizabeth Smith* for life, also several legacies, as 500*l.* to his nephew *Lewis Doleman*, payable at his age of twenty-five; 1000*l.* to his niece *Dorothy*, payable at her age of twenty-five; and devised his manors and lands

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to trustees and their heirs, chargeable with the payment of his debts, legacies, annuities and funerals, upon trust that they should receive the rents, issues and profits until his said eldest nephew *Thomas-Humphrey Doleman*, or such person as should be entitled to the premises under the will, should attain his age of twenty-five, and that the trustees should out of the profits pay 30*l.* per annum to *Thomas-Humphrey Doleman*, and 20*l.* per annum a-piece to *Lewis* and *Dorothy* until their respective ages of twenty-five; the rest and residue, after debts, annuities, legacies and funerals, and the charges of the trustees paid, the testator gave to *Thomas-Humphrey Doleman*, or to such other person as should be entitled to the next and immediate reversion of the premises, when they should attain the age of twenty-five years; also that from and after his nephew *Thomas-Humphrey* should attain his age of twenty-five, the premises should be to the use of him and the heirs male of his body, remainder to *Lewis Doleman* and the heirs male of his body, remainder to *Dorothy* in like manner, with divers remainders over; and having made his trustees *Dean*, *Smith* and *Weston*, executors, the testator died the 30th of *April* 1711.

Thomas-Humphrey Doleman died the 30th of *August* 1712, an infant, intestate and without issue; *Lewis* the next nephew died the 17th of *April* 1716, an infant about sixteen years old, having left his mother *Mary Webb*, who was the widow of *Lewis Doleman* the father, (and afterwards wife of Mr. Ser-
[603] jeant *Webb*) executrix. 30 *August* 1716, *Dorothy Doleman* intermarried with *John Talbot*, who afterwards together with his wife then an infant assigned over the 1000*l.* legacy given to her by her said uncle Sir *Thomas Doleman*'s will to ——— *Wilbraham* for 750*l.* *Hillary* 1719, *Talbot* and his wife, she having attained her age of twenty-one, levied a fine to *Richard Combs*, and in *Easter* term then next suffered a recovery, and by deed of lease and release dated the 2d and 3d of *March* 1719, declared the use thereof to be, to the intent that *Richard Combs* should have an annuity or rent-charge of 100*l.* per annum in fee, in consideration of the great and signal services done to Mr. *Talbot* and his wife, by the said *Richard Combs*, and of 900*l.* by him paid or secured to be paid to them, the premises thus charged to be to the use of *Talbot* and his wife for their lives, without waste, remainder to the use of such persons, and for such intents and purposes, as the husband and wife, or the survivor of them, by writing under the hands and seals of them, or the survivor of them, attested by two witnesses,

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should appoint, and for want of such appointment to *Dorothy* the wife in fee.

28th of *May* 1720, *John Talbot* articled to sell the premises to the Duke of *Chandos* for 20,718*l.* the coppice and timber to be valued and paid for by the Duke, besides the purchase money; the 31st of *January* 1722, *Dorothy* the wife attained her age of twenty-five; and on the 17th of *December* following the Duke of *Chandos* brought his bill against *John Talbot* and *Dorothy* his wife, and others, to have a specific performance of the articles; the said *Dorothy* at the same time bringing her cross bill to set aside the fine and recovery and deed of uses.

The 27th of *July* 1727, the causes were heard, when so much of the cross bill as sought to set aside the fine, recovery and deed of uses, was dismissed, the Duke's articles established and decreed to be performed, and the timber ordered to be valued by two indifferent persons to be appointed by the Master, who was to see what money *his Grace* had paid in satisfaction of incumbrances affecting the estate. [604]

The Master made his report, and on exceptions taken thereto, the cause being again brought on, these points arose:

1*st*, As to two sums of 133*l.* 6*s.* 8*d.* and 133*l.* 6*s.* 8*d.* which were said to be part of the said 400*l.* charged on the premises, and which had been assigned to *Lewis Doleman* and *Dorothy Doleman* respectively, it was insisted that *Lewis Doleman* surviving his elder brother *Thomas-Humphrey Doleman*, became tenant in tail of the estate charged with this 133*l.* 6*s.* 8*d.* which was assigned to him, and as an estate-tail was devised to him by his uncle Sir *Thomas Doleman*'s will, this was an inheritance which might endure for ever, and therefore did merge the charge of 133*l.* 6*s.* 8*d.* assigned to him.

Sed per Cur': Here can be no merger, because by the settlement made by Sir *Thomas Doleman* the father, the manor and premises were vested in trustees until payment of the 400*l.* which legal estate yet continued in them, and which being a fee-simple makes it a stronger case than that of *Thomas* and *Kemish*, 2 *Vern.* 348. where there was a term of 500 years in trustees * to secure a daughter's portion payable at eighteen or marriage, the fee descended to the daughter, who afterwards died unmarried and an infant about eighteen, having first made a nuncupative will, and thereby devised *all in her power* to her

Where 100*l.* is charged upon a real estate, which estate itself comes to the person entitled to the money, if in fee the charge is merged; but where the 100*l.* charged is secured by a term or other legal estate in a

third person, there the charge is not merged, nor if the estate which comes to the person entitled to the money be only an estate-tail.

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mother; whereupon it was decreed by the Lord *Sommers*, and affirmed by the House of Lords, that this portion was not merged, but should go to her mother, who had administration with the will annexed. Indeed had this been a mere equitable charge upon the land, and a fee-simple, not an estate-tail only, had come to *Lewis Doleman* the son, it might then have been a merger (1).

One having a sum of money charged upon land secured by a term in a third person, levies a fine of the land; this extinguishes his right to the charge; so if he suffers a recovery.

2*dly*, As to the 133*l.* 6*s.* 8*d.* assigned to *Dorothy*, it was urged, that she having joined in a fine and recovery of the premises, this would extinguish all her right to any thing issuing out of or charged upon them, either present or future, and consequently barred her right to the 133*l.* 6*s.* 8*d.* to which opinion the *Lord Chancellor* at first inclined (2).

But it afterwards appeared, on the reading of the will which gave the 400*l.* to these children of *Lewis Doleman* the second son, that it was only a legacy at large, and not any part of the money secured by the charge which Sir *Thomas Doleman* the father had made upon the estate; wherefore this exception to the Master's report was waived.

Another exception was concerning the valuation of the timber, and what was timber; for the Master by his report had charged the Duke with the valuation of young saplings, estimated but at 12*d.* or 18*d.* a-piece, which being several thousands amounted to above 400*l.* as also of pollards, some of

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which were rotten, or contained no timber; the same of walnut trees, which were not timber, though some of them were worth 20*l.* and others 40*l.* a tree; also yew, cherry, crab, lime and horse-chesnut trees were valued as timber in the *Master*'s report.

In a purchase where timber is agreed to be valued, the custom of the country makes those trees timber, which in their nature are not so, as birch, beech, &c. pollard trees, if the bodies are sound, to be valued as timber.

Lord Chancellor: It is the custom of the country that makes some trees timber, which in their nature, generally speaking, are not so, as horse-chesnut and lime trees, so of birch, beech, and asp, and as to pollards, notwithstanding what is said in

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(1) Vide *Chester* v. *Willes*, Amb. 246 (*z*).

(2) Vide *Stephens* v. *Lord Bateman*, 1 Bro. C. C. 22.

(*z*) *Countess of Shrewsbury* v. *E. of Shrewsbury*, 3 Bro. C. C. 120. *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261. *Forbes* v. *Moffatt*, 18 Ves. 384. *Price* v. *Gibson*, 2 Eden, 115. *Donisthorpe* v. *Porter*, Amb. 600, 2 Eden. 162.

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Plowd. 470. in the case of *Soby* versus *Molyns*, that these are not timber, and that tithes are to be paid of their loppings, (which could not be if pollards were timber) yet if the bodies of them be sound and good, I incline to think them timber; *secus* if not sound, they being in such case fit for nothing but fuel.

With regard to the walnut trees it was said, that though these might be valuable in themselves, yet since the Duke by the articles was only to pay for the *timber*, (by which could be meant only such trees as were fit to be used in building and repairing houses) therefore walnut trees being no ways proper for these uses, were not to be valued, which rule would also extend to young saplings or trees called titlers, though all these might in time come to be timber; however, not being so when the articles were executed or decree pronounced, the Duke was not to pay for them.

Walnut trees, where of considerable value, to be estimated as timber. Where trees are of value, and the parties cannot agree in the valuation of them as timber, the Court will send it to be tried whether by the custom of the country any and which of these are timber trees.

Lord Chancellor: If a timber tree which may not be worth 3*l.* or 4*l.* shall be valued or paid for in the purchase, why not walnut trees, some of which may be worth 10*l.* 20*l.* or even 50*l.* a-piece? However as these trees seem to be of considerable value, unless * the parties can agree amongst themselves to lump the valuation, and as it is the custom of the country which ascertains what are timber trees, making some to be esteemed such which in their nature, generally speaking, are not, especially in countries where timber is scarce, I shall direct an issue to try whether any, and which of these trees are by the custom of the country to be accounted timber.

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Then a question arose, whether the 1000*l.* legacy given by Sir *Thomas Doleman* the son's will, to *Dorothy* payable at her age of twenty-five years, and assigned by her husband Mr. *Talbot* and her before she came to age, and for the sum of 750*l.* only, was a good assignment; for though Mr. *Talbot* and his wife did join in a fine and recovery of the premises charged therewith, yet if it were well assigned to *Wilbraham* before the fine, the subsequent fine could not hurt it; to which the Court agreed.

And here it was objected, that the wife being then an infant, the assignment was void as to her; that it was a *chose en action* in its nature unassignable, and wholly in contingency until *Dorothy* should attain her age of twenty-five; before which time if she had died, being a charge upon land, it would have sunk. Also this 1000*l.* was insisted on to be merged, because *Dorothy* living to twenty-five, the estate-tail became

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completely vested in her, and such estate turned afterwards into a fee-simple by a recovery; consequently when the charge upon the land, and the land itself came to the same person, there must be a merger; that the issue of *Dorothy* could not be charged therewith at the suit of her administrator, wherefore it could not be said to subsist nor be assignable; but supposing this 1000*l.* to be assignable, yet as it was assigned for

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less money than was really due, (viz.) for 750*l.* instead of 1000*l.* the assignee *Wilbraham* should only have the money he actually paid, and not the whole 1000*l.* which though as against the assignor he might be entitled to, yet as against a mortgagee or creditor of the assignor, he could claim no more than what he had actually laid down, agreeable to the distinction taken in the case of *Williams* versus *Springfield*, 1 *Vern.* 476.

A chose in action, though not assignable at law, yet is so in equity, where the husband may assign it alone, as he may any other part of the wife's personal estate. So may a contingent interest which the husband has in right of his wife, or a possibility of a term, which though not good strictly by way of assignment, yet will operate as an agreement, where for a valuable consideration.

To which it was answered, that though a *chose en action*, as a bond, &c. was not in strictness of law assignable, yet in equity (1) it was, as every day's experience shewed; that though the wife was an infant when the assignment was made, yet that could not be material; for if she had been of age and joined, the deed as to her would have been void, and she might have pleaded *non est factum*, but being a personal thing the husband alone might assign it; and with regard to its being a contingency until the wife *Dorothy* should come to her age of twenty-five, it had been determined that the possibility of a term, (viz.) where a term was devised to *A.* for life, remainder to *B.* for the residue thereof, such possibility might be assigned even by the husband alone, as appears from the case of *Theobald* versus (2) *Duffay*, decreed first by the Lord *Macclesfield*, affirmed afterwards by the present Chancellor, and last of all by the House of Lords (*z*). But were

(1) *Jacobson* v. *Williams*, ante, 1 vol. 385. *Higden* v. *Williamson*, post. 3 vol. 132.

(2) 9 Mod. 102.

(*z*) But in that case *the wife joined* in the assignment, on which foundation Lord *Hardwicke* says the Court determined. *Bush* v. *Dalway*, 1 Vez. 20. 3 Atk. 533. The husband was an alien, (9 Mod. 102.) and so could neither take nor transfer any interest in the term. However, an assignment by the husband of the wife's possibility will be good in equity, if the husband, as in the principal case, is alive when it comes into possession, but not otherwise. *Hornsby* v. *Lee*, 2 Madd. 16. *Cordell* v. *Acton*, cited in *Stamper* v. *Barker*, 5 Madd. 162.

it not in strictness to operate by way of assignment, yet it would be good as an agreement, especially when made for a valuable consideration; that in the case of *Beckley* (*a*) and *Newland*, where two, whose wives were coheiresses to one Mr. *Turgis*, and in expectation of gaining considerably by him, agreed in Mr. *Turgis*'s life-time to divide between them what should come to either of them by virtue of his will; this was an agreement concerning a much more remote possibility than that in the present case, and yet was established by a decree of this Court.

(*a*) Ante 182.

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Then as to the objection of the assignment's being made for 750*l.* instead of 1000*l.*; the interest of the 750*l.* from the time of making the assignment to that of *Dorothy*'s attaining twenty-five would amount to near 1000*l.* and considering the chance the assignee run of *Dorothy*'s dying before her age of twenty-five, the very insuring of her life would come to so large a sum of money as to make it a dear bargain. That it would be still more unreasonable, should Mr. *Talbot* be construed to have destroyed his own assignment of this 1000*l.* legacy by his own subsequent fine, that he, against his own assignment, after having received a valuable consideration for the same, nay the full value, considering the remoteness of the time of payment, and the hazard of the legacies sinking in the meanwhile, should have the legacy again; and with regard to any judgment or other creditors of Mr. *Talbot*, as they claimed under him, and had no specific lien on the legacy, they could not be in a better condition than he himself was; for which reasons the *Lord Chancellor* decreed this assignment of the 1000*l.* legacy to *Wilbraham* to be good, and that he was entitled thereto with interest from the time *Dorothy* came to the age of twenty-five.

The last question was touching the legacy of 500*l.* which by the first part of the will of Sir *Thomas Doleman* was given to his nephew *Lewis Doleman* to be paid at his age of twenty-five, and so a vested legacy as to the personal estate, after which the testator's real estate was charged therewith; and in regard *Lewis Doleman* died an infant of about the age of fifteen, and before the time appointed for the payment, it was insisted that this being a legacy charged upon land, did sink for the benefit of the *hæres factus* or *natus;* that here the premises chargeable with this legacy, amongst other parts of the real estate of the testator, were devised to trustees and their heirs, upon the trusts and to the uses herein before mentioned; it was true in case of a bequest of any sum of

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money out of a personal estate to one, *to be paid* at his age of twenty-one or twenty-five, if the legatee dies before the time of payment, it becomes notwithstanding a vested legacy transmissible to executors or administrators; but where such legacy is devised out of a real estate, and the legatee dies before the time appointed for payment, there the legacy shall sink into the land; because equity will not load an heir for the benefit of an executor or administrator. One of the first cases of which nature was that of *Paulett* and *Paulett*, 1 *Vern.* 204, 321, where a portion was charged upon a term for years raised out of an inheritance for that purpose, payable to a daughter at twenty-one or marriage; the daughter died before twenty-one unmarried, and her administratrix suing in equity for this portion, the Court decreed it should sink into the land.

No diversity where a portion is charged by will upon land, and where by deed payable to an infant at 21; for in both cases if the infant dies before 21, it sinks into the land.

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Afterwards cases happened where lands were by *will* charged with portions for children, payable at their ages of eighteen or twenty-one; and on the child's dying before such time, it was objected, that though it had been determined, where by deed or settlement, lands were charged with portions for younger children payable at certain times, this being upon a marriage treaty where the parties contracted and stipulated for particular purposes (as the advancement of daughters in marriage) and when the fact so happened that the daughters died before they had any occasion for their portions, these were decreed to sink: yet a legacy given by a will, was to be looked upon as a bounty, and not as arising upon any treaty, contract or stipulation between the parties, for which reason it should not here sink as in case of a settlement.

Notwithstanding which, such distinction has been disallowed, and the rule in equity settled to the contrary, as appears from the case of *Smith* and *Smith*, 2 *Vern.* 92. where a portion charged upon land by a will payable at a future day, on the child's dying before the day, was determined to sink in the land, to which purpose I cited the case of *Yates* and *Fettiplace*, 2 *Vern.* 416. as in point, where a legacy was given out of a personal estate (and in aid thereof the real estate made subject) payable at a future day, before which day the legatee dying, though not only the difference before mentioned between a settlement and a will was insisted upon, but likewise another distinction attempted to be made, (viz.) where a legacy was charged both upon a real and personal estate, and where upon lands only: yet was it decreed that the legacy should sink into the land. Also I mentioned the case of *Jen-*

So where a portion is given out of a personal estate, payable at a future day, and if that not sufficient, then out of the real estate; since if the person to whom it is given, dies before the portion is payable, it sinks as to the land.

nings versus *Lookes* (*a*) heard before the *Master of the Rolls* and Mr. *Baron Gilbert*, when Lords Commissioners of the great seal, in which case a legacy was given to a child, payable at twenty-one, out of the personal estate which if not sufficient, the real estate, to be liable; and in that case the above-mentioned diversity between a portion secured by a deed and a will was insisted on; nevertheless this distinction was over-ruled, and it was held that though if the administrator of the legatee who died before twenty-one, could get all or any part of the legacy out of the personal estate, he was at liberty so to do; yet with respect to the land, he should recover no part from thence.

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(*a*) Ante 276.

In answer to all which it was urged, that there was a material difference between a portion contracted for by stipulation of the parties before marriage, or secured by a marriage settlement, and legacies charged upon land by will, which is a mere bounty; as also between a portion to a child for whom the father is bound to provide, and a legacy to a nephew or remote kinsman, for whom the testator is not obliged to make any provision. That in the principal case the 500*l.* being given first as a legacy out of the personal estate, it would not sink, but subsist, though the child should have died before the day of payment; and when by the latter part of the will the land came to be charged, this was only a security in aid, but still for the payment of what was before given out of the personal estate, just as if a subsequent mortgage had been made for the payment of the legacy, the nature thereof or its subsistence would not thereby have been altered, but it would still continue a legacy.

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At another day, this cause having been adjourned in order to search precedents, the *Lord Chancellor* said he had looked into the case of *Yates* and *Phettiplace* in 2 *Vern.* and also that of *Jennings* and *Lookes*, both which came fully up to the present case, (viz.) that where the personal estate was not sufficient, and the real estate in failure thereof was made liable to answer the legacies, in case of the legatee's dying before the legacy became due, the charge upon the land determined; that it seemed but a very slight and superficial diversity between a legacy given *at* twenty-one, and *payable* at twenty-one; and though it had been established in the (1) Spiritual Court, as

(1) The distinction above mentioned with respect to interests arising out of personal property (as far at least as they are of a *legatory* nature), although explained and in some degree corrected by the more modern cases, is, in substance,

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to legacies given out of a personal estate, it did not deserve to be favoured or countenanced, where the legacy is charged upon land, and the infant legatee dies before twenty-one, or

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established by *Lampen* v. *Cloberry*, 2 Cha. Ca. 155. *Smell* v. *Dee*, 2 Salk. 415. 1 Eq. Ca. Ab. 295. pl. 2. note. *Barlow* v. *Grant*, 1 Vern. 255. *Onslow* v. *South*, 1 Eq. Ca. Ab. 295. pl. 6. *Stapleton* v. *Cheeles*, Pre. Cha. 318. *Love* v. *L'Estrange*, 3 Bro. P. C. 337. *Corbet* v. *Palmer*, 2 Eq. Ca. Ab. 548. pl. 27. *Lowther* v. *Condon*, Barnard. 329. *Steadman* v. *Palling*, 3 Atk. 427. *Goss* v. *Nelson*, 1 Burr. 227. *Barnes* v. *Allen*, 1 Bro. C. C. 181. *Monkhouse* v. *Holme*, 1 Bro. C. C. 298. *Benyon* v. *Maddison*, 2 Bro. C. C. 75. *May* v. *Wood*, 3 Bro. C. C. 471 (*z*). Where interest is given before the time of payment, it is evidence of an intention to vest the legacy, *Collins* v. *Metcalfe*, 1 Vern. 462. *Stapleton* v. *Cheeles*, 2 Vern. 673. and Pre. Cha. 318. S. C. *Atkins* v. *Hiccocks*, 1 Atk. 501. *Van* v. *Clarke*, 1 Atk. 512. *Neale* v. *Willis*, Barnard. 43. *Fonnereau* v. *Fonnereau*, 3 Atk. 645. and 1 Vez. 118. S. C. *Walcot* v. *Hall*, 2 Bro. C. C. 305 (*y*). But it seems that these authorities are not applicable to any interests but those of a *legatory* nature, although the fund be merely *personal*. *Hubert* v. *Parsons*, 2 Vez. 262. *Lord Teynham* v. *Webb*, 2 Vez. 207. *Goss* v. *Nelson*, 1 Burr. 227. So, with respect to all interests arising out of land, the rules on the subject are totally different; for, whether the land be the *primary* or *auxiliary* fund, whether the charge be made by *deed* or *will*, as a *portion* or *general legacy*, for a *child* or a *stranger*, *with* or *without* interest, the *general* rule is, that charges upon land payable at a *future* day shall not be raised, where the party dies before the time of payment, *Bond* v. *Brown*, 2 Cha. Ca. 165. *Lady Powlett* v. *Lord Powlett*, 1 Vern. 204. 321. *Smith* v. *Smith*, 2 Vern. 92. *Yates* v. *Phettiplace*, 2 Vern. 416. *Carter* v. *Bletsoe*, Pre. Cha. 267. *Tournay* v. *Tournay*, Pre. Cha. 290. *Stapleton* v. *Cheeles*, Pre. Cha. 318. *Jennings* v. *Lookes*, ante 276. *Rich* v. *Wilson*, Mos. 68. *Bateman* v. *Roach*, 9 Mod. 106. *Gordon* v. *Raynes*, post. 3 vol. 134. *Bradley* v. *Powell*, Ca. temp. Tal. 193. *Hall* v. *Terry*, 1 Atk. 502. *Prowse* v. *Abingdon*, 1 Atk. 482. *Boycot* v. *Cotton*, 1 Atk. 555. (in which the authority of *Jackson* v. *Farrant*, 2 Vern. 424. and *Cave* v. *Cave*, 2 Vern. 508. is denied) *Van* v. *Clarke*, 1 Atk. 512. *Richardson* v. *Greese*, 3 Atk. 69. *Attorney General* v. *Milner*, 3 Atk. 112. *Tunstall* v. *Bracken*, 1 Bro. C. C. 124. note. *Harrison* v. *Naylor*, 3 Bro. C. C. 108 (*x*). *Gawler* v. *Standerwicke*, 1 Bro. C. C. 106. (note.) (*w*). This rule however is subject to many exceptions, as where the time of payment is postponed from the circumstances, not of the person, but of the fund. *Lowther* v. *Condon*, 2 Atk. 127. 130. Barnard. 327. S. C. *Butler* v. *Duncombe*, ante, 1 vol. 457. *Pitfield*'s case, ante 513. *King* v. *Withers*, Ca. temp. Tal. 117, and post. 3 vol. 414. S. C. *Emes* v. *Hancock*, 2 Atk. 507. *Sherman* v. *Collins*, 3 Atk. 319. *Hutchins* v. *Foy*, Com. Rep. 716. *Hodgson* v. *Rawson*, 1 Vez. 44. *Thomson* v. *Dow*, 1 Bro. C. C. 193. note. *Man-*

(*z*) *Mackell* v. *Winter*, 3 Ves. 543. *Bolyer* v. *Mackell*, 5 Ves. 509. *Hanson* v. *Graham*, 6 Ves. 239. *Hixon* v. *Oliver*, 13 Ves. 113.

(*y*) *Booth* v. *Booth*, 4 Ves. 399. *Hanson* v. *Graham*, 6 Ves. 239. *Branstrom* v. *Wilkinson*, 7 Ves. 421. *Lane* v. *Goudge*, 9 Ves. 225. *Leake* v. *Robinson*, 2 Mer. 386.

(*x*) S. C. 2 Cox, 247. In this case the legacy was charged on land directed by the will to be purchased.

(*w*) S. C. 2 Cox, 15. *Phipps* v. *Lord Mulgrave*, 3 Ves. 613. Butler, Co. Litt. 237 a. Nor will the Court even marshal assets in favour of the representatives of the deceased legatee. *Pearce* v. *Loman*, 3 Ves. 135.

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before the time when the legacy is made payable; that there was not any the least difference between a sum of money charged by a will on land, payable to an infant at twenty-one, and where such charge arises by a deed. That the authorities before mentioned shew there is no difference where the real as well as the personal estate is charged, for in such case, as far as the executor or administrator claims out of the latter, he shall succeed according to the rule of that court where these things are determinable, even though the infant legatee dies before the time of payment, but as far as the legacy is charged upon the land, so far shall it, on the legatee's dying before the legacy becomes payable, sink; and this being the rule which has of late universally prevailed, be the legatee a child or a stranger, it would be of the most dangerous consequence, and disturb a great deal of property for him to break into it.

Wherefore he thought that the 500*l.* legacy payable to *Lewis Doleman* at twenty-five, on his dying before that time, as to so much thereof as was payable out of the land, must sink.

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ning v. *Herbert*, Amb. 575. *Tunstall* v. *Bracken*, 1 Bro. C. C. 124. note, and Amb. 167. S. C. *Embrey* v. *Martin*, Amb. 230. *Smith* v. *Partridge*, Amb. 266. *Jeal* v. *Titchener*, 1 Bro. C. C. 120. note. *Clarke* v. *Ross*, ibid. *Kemp* v. *Davy*, ibid. *Pawsey* v. *Edgar*, 1 Bro. C. C. 191. note. *Morgan* v. *Gardiner*, 1 Bro. C. C. 193. note. *Dawson* v. *Killet*, 1 Bro. C. C. 119. *Godwin* v. *Munday*, 1 Bro. C. C. 191 (*v*). In those cases where portions have been given out of land and *no time of payment* expressed, it seems difficult to reconcile the determinations: according to *Earl of Rivers* v. *Earl of Derby*, 2 Vern. 72. *Cowper* v. *Scott*, post. 3 vol. 119. *Wilson* v. *Spencer*, post. 3 vol. 172. they are interests vested presently, and transmissible, yet *Brewin* v. *Brewin*, Pre. Cha. 195. *Warr* v. *Warr*, Pre. Cha. 213. *Lord Teynham* v. *Webb*, 2 Vez. 209. *Tunstall* v. *Bracken*, 1 Bro. C. C. 124. note. *Lord Hinchinbrooke* v. *Seymour*, 1 Bro. C. C. 395. determine that such portions do not vest if the children die before they want them, et vide *Lowther* v. *Condon*, 2 Atk. 133.

(*v*) *Emperor* v. *Rolfe*, 1 Vez. 208. *Cholmondeley* v. *Meyrick*, 1 Eden, 77. 3 Bro. C. C. 253 (n.) *Willis* v. *Willis*, 3 Ves. 51. *Hope* v. *Lord Clifden*, 6 Ves. 499. *Shenck* v. *Legh*, 9 Ves. 300. *Powis* v. *Burdett*, ib. 428. *King* v. *Hake*, ib. 438. *Hallifax* v. *Wilson*, 16 Ves. 168. *Howgrave* v. *Cartier*, 3 V. & B. 79. Coop. 66. *Walker* v. *Main*, 1 Jac. & W. 1. Or where the testator has manifested an intention that the legacies should not sink. *Watkins* v. *Cheek*, 2 S. & S. 199.

1918.1.Ch.569

Case 192.

EASTWOOD *versus* VINKE, *or* EASTWOOD *versus* STYLES.

At the Rolls.

A father or mother may be cousin to the son, and as such inherit to him notwithstanding the relation of father, &c.

In this case one of the points was, where a son died seised in fee of land without issue, brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother, whether the mother could take as heir to her son?

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Object. The father or mother, grandfather or grandmother cannot take as heir to their son or grandson; they may, it is true, inherit by (*a*) circuity, as thus: the uncle may take as heir to the son, after which the father or mother may take as heir to the uncle, but the father or mother cannot, as in the present case, succeed immediately and in the first instance to the inheritance of the son.

(*a*) Vide Litt. sect. 3.

On the other side it was said, and so ruled by the *Master of the Rolls*, that though a father or mother could not *as father or mother* inherit immediately after the son; yet if the case should so happen, that the father or mother were *cousin* to the son, and as such his heir, they might take notwithstanding; and that here, though the heir was also mother, this did not hinder her from taking in the capacity or relation of cousin. *His Honour* further observed, that the other cousin being but half an heir could not take the whole, neither could any thing go to the lord by escheat, for as long as there is any heir left he cannot take; so that though the other cousin could take but a moiety, yet her being a moiety of an heir would prevent the lord's title by escheat (*z*); and that notwithstanding this was a very uncommon case, he took it to be a clear one.

2 Kel. in Cha. 36.

One gives a bond on his marriage, either within four months to settle lands of 100*l.* per ann. on his wife, or that his heirs, executors, &c. shall pay her 2000*l.* within four months after his death; husband after this devises to his wife lands of 8*l.* per annum, this shall not be taken in part of the 100*l.* per annum, but only as a benevolence.

Another point was, a man on the marriage of his wife, gave a bond to her trustee, in the penalty of 4000*l.* conditioned that if he at any time within four months should settle and assure freehold lands of the yearly value of 100*l.* on his wife for her life, or if his heirs, executors or administrators should within the space of four months after his death pay unto his said wife 2000*l.* then the bond to be void. The husband soon

(*z*) But see Co. Litt. 163. b.

after the marriage made his will, devising thereby freehold and copyhold lands lying intermixed in *Norfolk*, of the yearly value of 88*l.* to his loving wife and her heirs, having surrendered all his copyhold to the use of his will, and died within four months after the marriage. Whereupon the wife now insisted to retain these lands of 88*l.* per annum, and that in regard her husband had not settled the 100*l.* per annum for her life, she was also at liberty to elect the 2000*l.* out of his assets.

Against which demand it was urged, that this devise of lands of 88*l.* per annum was a satisfaction of the bond, because lands of 88*l.* per annum in fee-simple, were greater in point of value, and might be sold for more than would purchase 100*l.* per annum for her life, nay, might in a day's time be turned into an annuity of 100*l.* per annum; but taking it that this devise was not to go in satisfaction, yet it ought at least to go towards it; and therefore all that the executors of the husband had to do, would be to make up the 88*l.* per annum, 100*l.* per annum; that if the husband in his life-time had settled lands of 88*l.* per annum on her, supposing it were for life only, this had been a performance in part of his bond, and he would have been bound only to make it up 100*l.* per annum, for which purpose the case of *Wilcox* and *Wilcox*, 2 *Vern.* 558. was cited, where one bound to settle upon his son lands of 100*l.* per annum, left an estate of 100*l.* per annum to descend to such son, though the lands agreed to be settled were to be entailed, and those that descended a fee-simple, and so of a different nature, yet were these latter construed a satisfaction. That if in that case the lands descended had been but 88*l.* per annum, all that his executors by virtue of the covenant had been bound to do, would have been to make the lands descended of 88*l.* amount to 100*l.* per annum; so here the lands devised were to be made up but 100*l.* per annum, and 2 *Vern.* 498. *Brown* v. *Dawson* was cited, where *A.* on his wife's joining [616] in a sale of part of her jointure, gave her a note to pay her 7*l.* 10*s.* per annum for her life, and afterwards on a sale of a farther part, gave her a bond to pay her 6*l.* 10*s.* per annum for her life, and by will, without taking notice of the note or bond, gave her 14*l.* per annum for her life; the devise was held to be a satisfaction of the bond and note. So if a child has a portion secured to her by a settlement, and afterwards has the like or a greater portion given her by the will of the same parent who made the settlement, the legacy shall be taken in

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(*a*) Vide vol. 1. 147. 299.

(*a*) lieu of the portion by the settlement, and the child not have both.

It was farther observed, that the election was in the husband to settle lands of 100*l.* per annum on the wife for her life, within four months after the marriage, or that his heirs, executors or administrators should pay the wife 2000*l.* and here the husband dying within four months after the marriage, the election which he had should go to his heirs, executors or administrators, which election was considerable, since the land to be settled was but 100*l.* per annum for her life, but in default thereof the money to be paid her was near double the value, (viz.) 2000*l.*

Money and lands being things of a different kind, the one though of greater value, shall never be taken in satisfaction of the other, unless so expressed. Whatever is given by a will is prima facie to be intended a benevolence.

Master of the Rolls: As money and lands are things of a different nature, the one shall not be taken (1) in satisfaction of the other. Whatever is given by a will is *primâ facie* to be intended a bounty and benevolence; and it is remarkable that in the present case the devise is to his *loving* wife, which is a word of affection. I look upon it to have been a stretch, that where a man has owed *J. S.* 100*l.* and afterwards given him a legacy of 100*l.* this latter has been taken (2) in satisfaction of the former, since at that rate nothing is *given;* but though the Court has gone so far, it never yet construed a devise of land to be a satisfaction for a debt of money, much less has it decreed that a legacy of a less sum than the debt should be deemed a satisfaction *pro tanto;* the devise of such of the land as is copyhold cannot possibly go towards satisfaction of the 100*l.* per annum, which was to be freehold; nay supposing the whole 88*l.* per annum were freehold, it would not go to-

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(1) *Cranmer*'s case, 2 Salk. 508. *Hooke* v. *Grove*, 2 Eq. Ca. Ab. 218. pl. 4. and 1 Bro. P. C. 464. S. C. *Chaplin* v. *Chaplin*, post. 3 vol. 247. *Bellasis* v. *Uthwait*, 1 Atk. 426. *Barret* v. *Beckford*, 1 Vez. 521. *Broughton* v. *Errington*, 7 Bro. P. C. 12. *Grave* v. *Earl of Salisbury*, 1 Bro. C. C. 425. So, the thing substituted must be equally certain and advantageous with the thing due or contracted for, *Atkinson* v. *Webb*, 2 Vern. 478. *Masters* v. *Masters*, ante 1 vol. 423. *Crompton* v. *Sale*, ante, 555. *Bellasis* v. *Uthwait*, 1 Atk. 426. *Nicholls* v. *Judson*, 2 Atk. 300. *Graham* v. *Graham*, 1 Vez. 262. *Clark* v. *Sewell*, 3 Atk. 96. *Middleton* v. *Pryor*, Amb. 391. *Haynes* v. *Mico*, 1 Bro. C. C. 129. *Jeacock* v. *Falkener*, 1 Bro. C.C. 295(*z*). *Devese* v. *Pontet*, at the Rolls, *Nov.* 8th and 10th 1785 (*y*).

(2) Vide *Chancey*'s case, ante, 1 vol. 408.

(*z*) S. C. 1 Cox, 37.

(*y*) Pre. Cha. 240. (n) (Finch's edit.) 1 Cox, 188. See also *Richardson* v. *Elphinstone*, 2 Ves. jun. 463. *Garthshore* v. *Chalie*, 10 Ves. 1. *Bengough* v. *Walker*, 15 Ves. 507. *Monck* v. *Lord Monck*, 1 Ba. & Be. 303. *Goldsmid* v. *Goldsmid*, 1 Swan. 219.

wards satisfaction of the 100*l.* per annum, not being so expressed; but if there be not enough to answer the rest of the charges laid upon the land, or the bond creditors who may come upon the land, then indeed so much of the 8*l.* per annum devised as is freehold, might be taken towards satisfaction, because otherwise the testator's will would be disappointed; though supposing there are assets to pay all the bond debts, and likewise the charges laid by the will upon the land (which was afterwards admitted) in such case the 8*l.* per annum shall be enjoyed as a bounty and benevolence; *vide* 4 *Co. Vernon's* case, and also that of (*a*) *Lawrence* versus *Lawrence.*

(*a*) 2 Vern. 365.

A. bound within four months after his marriage to settle lands of 100*l.* per annum on his wife, or else to leave her 2000*l.* and dies within the four months, after which the four months pass; his executors shall elect, whether to pay the 100*l.* per annum, or the 2000*l.*

As to the objection, that the heirs or the executors of the testator ought to have their election either to settle lands or pay the money, the husband, it is true, had this election in him, which was to continue four months after the marriage, but he dying within the four months, though the time expired afterwards, yet where, upon the death of the testator, matters are for some time in confusion, nothing is more usual than for the Court to (*b*) enlarge the time, or to relieve against any lapse thereof; wherefore let the husband's executors pay the incurring profits of the 100*l.* per annum, from the death of the husband, to the wife, and settle upon her the 100*l.* per annum, they not being bound to pay the 2000*l.* to her, but the 8*l.* per annum devised shall not be taken as part of the 100*l.* per annum agreed to be settled (1).

(*b*) Vide ante 68.

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(1) Reg. Lib. A. 1730. fol. 469. and affirmed on appeal to the Lord Chancellor. Pasch. 1732, Reg. Lib. A. 1731. fol. 297.

8. Sim. 14.
2. Ru. & Mr. 199.

NORTH *versus* ANSELL.

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CASE 193.

At the Rolls.

2 Eq. Ca. Ab. 209. pl. 5.

A MAN, in consideration of a portion of 500*l.* which he was to have in money and goods with his wife, and in consideration of the marriage, made a settlement before marriage of land to the use of himself for life, remainder to trustees for 200 years, remainder to the wife for life, remainder to himself in fee; the trust of the 200 years' term was to raise 200*l.* to be paid as the wife by her will or any writing should direct; the husband and

One in consideration of marriage and of 500*l.* portion which he is to have with his wife, by settlement impowers the wife to dispose of 200*l.* by her will; they live together fifteen years, and the wife gives the 200*l.* away by her will; the husband at this distance of time shall not be admitted to say he had not 500*l.* with his wife, but shall pay the money.

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wife having lived together about fifteen years, she made a will, appointing the payment of the 200*l.* and died before her husband. On the appointees bringing their bill for the raising of this 200*l.* the husband insisted, that he never received above 300*l.* as a marriage portion with his wife, and that his having 500*l.* was as a condition precedent, and the consideration for her power of disposing of 200*l.* and to be understood thus, 200*l.* *out of her* 500*l.* or as if the words had been, *that upon condition the husband should receive* 500*l.* *with his wife,* he would then allow her to dispose of 200*l.* out of it.

Master of the Rolls: The consideration of this power to dispose, is not only the wife's portion but the *marriage,* which last alone, without any portion, had been a good consideration, both for the power and also the jointure; the *quantum* of the portion seems rather a computation than otherwise, and it is not to be imagined but that the husband would and did look into such *quantum* before the marriage, and was satisfied therewith; nor is there the least evidence of any fraud: the reason why this Court does not relieve against marriage contracts for settlements, jointures or other provisions, though they may be very unequal, and in favour of the wife, is, because it cannot set the wife *in statu quo,* or unmarry the parties, as was said in the case of *Wicherley* and *Wicherley,* where the remainder man brought a bill to be relieved against a jointure made by the tenant for life, even upon his death-bed, in consideration of and previous to his marriage, by virtue of a power reserved to him; in which case the Lord *Parker,* assisted by the Lord Chief Justice *Pratt* and myself, denied relief. Moreover the answer of the husband in this case is very tender, denying that for *the marriage portion* he received above 300*l.* whereas he might receive more afterwards, and it would be extremely hard and unreasonable, to put the legatees of the wife, who may be strangers to all these matters, at the distance of fifteen years, after so long an acquiescence of the husband, to shew he received a portion of 500*l.* with the wife, which, had the husband died soon after the marriage, might easily have been made to appear; wherefore, upon a presumption that the husband received the 500*l.* I shall decree the 200*l.* to be raised with interest from the end of the year after the wife's death, and with costs (*z*).

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A settlement or jointure on a marriage, though made very unequally, and in favour of the wife, will not be set aside in equity as that cannot put the wife in statu quo.

(*z*) *Perkins* v. *Thornton,* Amb. 502. *Crofton* v. *Ormsby,* 2 Sch. & L. 602.

2. Ju. & Cr. 700.

BLIGH & al'. *versus* EARL OF DARNLEY.

CASE 194.

At the Rolls.

Marshalling of assets.

THE late Earl of *Darnley*, the defendant's father, seised in fee of a great real estate both in *England* and *Ireland*, and possessed of a leasehold in *Scotland*, and likewise of a considerable personal estate, having two sons and three daughters, by his will devised 8000*l.* a-piece to his two eldest, and 6000*l.* to his youngest daughter, charging his real estate with the payment thereof. Afterwards by a codicil he bequeathed several pecuniary legacies of considerable value to his several brothers [620] and sisters (the plaintiffs) without charging his real estate with the payment of these latter legacies. Subsequent to which he entered into a contract before the Master for the payment of 17,000*l.* for a third part of the manor of *Cobham-Hall*, in *Kent*, he having two thirds of the said manor before. The Master reported him the best purchaser, and before his death, which happened soon after, the report was absolutely confirmed.

The Lord *Darnley*'s personal estate, before his entering into the contract for the purchase of this estate, was sufficient for the payment of all his legacies, but the performance of the contract would (as it was thought) occasion a deficiency of assets.

One by will gives several legacies, some charged on the real estate and others not; if the personal estate proves not sufficient to pay all, the legacies charged on the real estate shall be paid thereout; or if they have been paid out of the personal estate, the other legacies as to so much, shall stand in their place upon the land.

Mr. *Hornby*, who was the owner of the third part of the manor of *Cobham*, having brought his bill against the executors and heir of the late Earl of *Darnley*, to have the purchase completed and the money paid, obtained a decree for the same; at which time the now plaintiffs the younger brothers and sisters of the late Earl, brought their bill, setting forth the will, and that several pecuniary legacies had been given them out of the personal estate in general; that his daughters had the above mentioned legacies charged upon the real estate, and that the testator, since the making his will, having entered into this contract for the purchase of the *Cobham* estate, whereby there might be a deficiency of the personal assets for the payment of those legacies: Therefore they prayed that the assets might be marshalled, and the daughters' legacies paid out of the real estate; or if already recovered out of the personal, then that the plaintiffs the brothers and sisters might stand in the place of the daughters, and take so much out of the land for their legacies as these had exhausted out of the personal

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estate: which the Court decreed as reasonable, and within the common rule of marshalling assets (1).

But then it was further pressed by Mr. *Attorney General*, that the debt contracted for this purchase by the late Earl of *Darnley* was due by a *decree*, a contract made with the intervention of, and confirmed by, the Court, which had ordered the late Earl to pay it, and taking it to be a debt due by a decree, it was then in nature of a judgment, which would bind the real assets in the hands of the heir; and if so, then since the land agreed to be purchased was real assets, consequently even that, and more plainly the other real estate devised or descended to the defendant the infant Earl, was assets liable to the decree, and the purchase money contracted to be paid for *Cobham* manor ought to come out of the real estate, by which means there would be personal estate sufficient left for payment of the pecuniary legacies given to the plaintiffs.

One allowed the best purchaser under a decree is ordered to pay the purchase money; this not a debt due by a decree, but only by order of the Court.

But the *Master of the Rolls* was very clear in his opinion against the plaintiffs, as to this last point, holding it not to be a debt due by a decree, but only by an order of Court against the late Earl, for the payment of the purchase money, who not being party to the original cause, but coming in before the Master, it could not be said there was a decree against him; but supposing there was a decree, yet where it is said a decree is equal (2) to a judgment, or to be paid (3) next thereto, this must be intended only out of the personal estate; whereas a decree for a debt does not bind the real (4) estate, acting only

Where there is a decree for a debt, and the defendant dies, such decree does not bind the real assets descended to the heir, as a judgment does. The only way upon a decree for a debt to affect land is to proceed for a contempt to a sequestration; but such sequestration abates by the death of the party, which an extent does not.

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(1) *Hyde* v. *Hyde*, 3 Cha. Rep. 155. *Masters* v. *Masters*, ante 1 vol. 422. *Clifton* v. *Burt*, ante 1 vol. 679.

(2) *Mason* v. *Williams*, 2 Salk. 507. *Searle* v. *Lane*, 2 Vern. 89. *Joseph* v. *Mott*, Pre. Cha. 79. *Martin* v. *Martin*, 1 Vez. 214 (*z*).

(3) *Harding* v. *Edye*, 1 Vern. 143.

(4) Vide *Morice* v. *Bank of England*, Ca. temp. Tal. 222. *Astley* v. *Powis*, 1 Vez. 496 (*y*).

(*z*) *Perry* v. *Phelips*, 10 Ves. 34. So, a decree for the administration of assets, which is in the nature of a judgment for all creditors. *Paxton* v. *Douglas*, 8 Ves. 520. *Largan* v. *Bowen*, 1 Sch. & L. 299. And see *Douglas* v. *Clay*, 1 Dick. 393. *Kenyon* v. *Worthington*, 2 Dick. 668. *Gilpin* v. *Lady Southampton*, 18 Ves. 469. *Farrell* v. *Smith*, 2 Ba. & Be. 342. *Terrewest* v. *Featherby*, 2 Mer. 480. *Sims* v. *Ridge*, 3 Mer. 464. *Jackson* v. *Leaf*, 1 Jac. & W. 229. *Fleming* v. *Prior*, 5 Madd. 423.

(*y*) *Mildred* v. *Robinson*, 19 Ves. 588.

in personam, not *in rem*, and the remedy upon a decree to affect the land is only for a contempt, whereupon the party proceeds to a sequestration, which process is not of a very long standing; and that a sequestration (1) is but a personal process appears by its falling and abating by the death of the party; on the other hand, an extent upon a judgment does not so abate. That judgments did not affect the land until the statute of *Westm.* 2 (13 *Ed.* 1. *c.* 18.) which can hardly be thought to have included a decree; nay plainly it does not, for if so, it would have affected but a moiety of the land, as a judgment does; whereas upon a sequestration the plaintiff takes the whole profits; that if a decree for a debt should be obtained, and the defendant die leaving no personal, but a considerable real estate in fee, the latter would not be affected by the decree in the hands of the heir, as it would in case of a judgment; and were this otherwise, surely after so many thousand decrees and instances of deficiencies of personal assets for the satisfying thereof, some cases would be found where land had been sequestered for such debts in the heirs' hands, but no precedent of this kind was ever heard of; and though the land thus contracted to be purchased must in equity be taken as land, descendible and devisable as such, still it is not liable to the decree.

Whether a leasehold estate in Scotland can be valued here as personal assets, as a leasehold in Ireland may.

However, the plaintiffs hoping that the personal assets would be sufficient to answer not only all the legacies, but also this contract for the purchase, when the daughters' legacies were placed upon the land, the Court decreed an account to be taken of the personal estate, doubting at the same time whether the leasehold in *Scotland* could be looked upon as personal estate in *England* (*y*), though a leasehold estate in *Ireland* is personal assets in *England*, and may be sold here; but the Master was left at liberty to report any thing specially (2).

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(1) So *Morice* v. *Bank of England*, ubi sup. *Wharam* v. *Broughton*, 1 Vez. 182. but in *Hawkins* v. *Crook*, 3 Atk. 594. it is said that although a sequestration on *mesne process* be determined by the death of the party, yet it is otherwise where it issues for non-performance of a decree (*z*).

(2) Reg. Lib. A. 1730. fol. 505.

(*z*) See *Rowley* v. *Ridley*, 2 Dick. 626. *Hyde* v. *Greenhill*, 1 Dick. 106. *Hyde* v. *Forster*, 1 Dick. 132. *Coulston* v. *Gardiner*, 3 Swan. 279 (n). *Lord Caermarthen* v. *Hawson*, ib. 294 (n).

(*y*) If an executor has assets of his testator in any part of the world, he shall be charged with them. *Dowdale*'s case, 6 Rep. 47. And where the subject is land situate in a foreign country, the Court will ascertain by inquiry whether the testator's interest in it was in its nature real or personal. *Gardiner* v. *Fell*, 1 Jac. & W. 22.

CASE 195.

COTTER *versus* LAYER.

Lord Chancellor KING.

Mos. 227.
1 Eq. Ca. Ab. 42. pl. 5.
2 Eq. Ca. Ab. 664. pl. 12.
Equity aids a defective execution of a power, if for a valuable consideration, and this against a remainder-man, or one not claiming under the power.

THE bill was to compel a specific performance of an agreement made by a feme on her marriage with her second husband, on this case: The 20th of *November* 1711, *Christopher Layer* and *Elizabeth* his wife were admitted to the copyhold premises in question, to hold to them two and to the heirs of the husband; the 1st of *September* 1717, *Layer* and his wife surrendered these copyhold premises to the use of the wife for life, and afterwards to such uses as she by any writing, or by her last will attested by three witnesses, should appoint; who accordingly by a writing purporting to be her last will, and signed by her in the presence of three witnesses, gave, devised, limited and appointed the premises to her daughter *Elizabeth Layer* in tail, remainder to her brother (one *Elwyn*) in fee. Afterwards *Elizabeth Layer* surviving her husband *Christopher* (he being attainted of treason and executed) did by deed or writing attested only by *two* witnesses, upon a marriage agreed to be had between her and the plaintiff *Cotter*, covenant to surrender the premises to the use of her intended husband *Cotter* and herself, and the heirs of *Cotter*, who covenanted on his part within twelve months to settle an annuity or rent-charge of 30*l.* per annum on the said *Elizabeth* his intended wife for life. The marriage took effect, and she died within the year.

3. Tr. Rep. 381.
31. Ch. D. 451.
1908. 1. Ch. 573.

The husband brought this bill against the defendant *Elizabeth*, the infant daughter of his late wife by *Christopher Layer*, to compel her to perform this covenant of her mother's.

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Objected 1*st*, This deed or writing of the wife's being attested by three witnesses, is a good settlement on the daughter, an effectual execution of the power which could not afterwards be altered; and that it must not operate as a will, but by way of writing declaring the use of the copyhold, because a feme covert cannot make a will.

(*a*) Vide Salk. 313. Shardelow v. Naylor.

Sed per cur': Though in (*a*) strictness a feme covert cannot make a will, yet where she is impowered to make a writing in nature of a will, the writing will operate as such (1).

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(1) *Oke* v. *Heath*, 1 Vez. 139. *Duke of Marlborough* v. *Lord Godolphin*, 2 Vez. 75. *Southby* v. *Stonehouse*, 2 Vez. 612 (*z*).

(*z*) *Vanderzee* v. *Aclom*, 4 Ves. 771. *Reid* v. *Shergold*, 10 Ves. 370.

2*dly*, Objected, Supposing this to be a writing in nature of a will, yet the agreement made by *Elizabeth Layer* upon her second marriage, being but a covenant, cannot amount to a revocation of a will, (*vide* 1 *Rol. Abr.* 615. said to have been so agreed in the case of *Montague* and *Jeffreys*) for the covenantor may at his election break or perform his covenant, and therefore a bare covenant cannot revoke a will.

Cur': Though a covenant or articles do not at law revoke a will, yet if entered into for a valuable consideration, amounting in this Court to a (*a*) conveyance, they must consequently be an equitable revocation of a will, or of any writing in nature thereof; and it is plain, in the present case, that the writing was intended as a will, and not to divest *Elizabeth Layer* of her estate during her life, as it must have done, were it an appointment of an use to take effect in present; nay, a woman's marriage is (*b*) alone a revocation of her will (*y*).

One devises land, and afterwards articles for a valuable consideration to sell or settle the premises; this in equity is a revocation of the will.

(*a*) See the very same said and resolved in the case of Sir Barnham Rider v. Sir Charles Wager, ante 332.

(*b*) 4 Rep. 61.

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3*dly*, Objected, These articles by *Elizabeth Layer*, to settle the copyhold premises on her second husband, were attested by two witnesses only, so not pursuant to the power, and consequently void.

Cur': These articles being for a valuable consideration, (viz.) that of marriage, though not in strictness pursuant to the power, I shall supply the want of circumstances in the same manner as I would the want of a surrender; otherwise had the agreement been voluntary (1).

Where there is a power to declare an use by a writing attested by three witnesses, and such use is declared by a writing only attested by two; if for a valuable consideration, equity will help it.

4*thly*, Objected, The defendant the daughter claims as heir of *Christopher Layer* her father, and not of *Elizabeth* her mother who made this covenant; and though the mother's covenant may bind her own heirs, yet can it not affect the heirs of her husband any more than any stranger whatsoever.

Cur': The case of *The Countess of* (*c*) *Coventry* versus *The Earl of Coventry* is stronger than the present; there the late Earl, who was but tenant for life, previous to and in consideration of a marriage and portion, covenanted to settle lands of 500*l.* per annum on the Countess pursuant to a power, and

(*c*) Ante, 222.

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(1) *Tollet* v. *Tollet*, ante 489. *Godwin* v. *Kilsha*, Amb. 684.

(*y*) *Doe* v. *Staple*, 2 T. R. 695. S. C. 2 Bro. C. C. 534. *Lewis's case*, 4 Burn's Ecc. Law. 47. in Chancery, nom. *Hodsden* v. *Lloyd*,

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dying before the jointure was made, equity compelled the present Earl, though claiming by virtue of a remainder, and not under him who entered into the covenant, to confirm and make good the jointure; which case being adjudged on solemn debate, and with the assistance of Judges, is a great authority, and to be observed by me; from thence it may be inferred, that whatever is in the power of the person covenanting to do, provided the covenant be for a valuable consideration, equity ought to look upon as done, and supply the want of circumstances against a remainder-man, and *a pari ratione* against the heir of the husband, whether such heir be mentioned or not. The case where the issue in tail was held not to be bound by articles, entered into by tenant in tail, and a decree obtained against him to perform such articles (*z*), is not parallel; since the issue claims paramount his ancestor, and by virtue of the statute of *Westmin.* 2. in contradiction to which equity cannot assist, but here no act of parliament interferes. Let the plaintiff hold and enjoy, and the defendant *Elizabeth Layer* (now an infant) when she comes to age must convey, unless she shews cause to the contrary within six months after attaining twenty-one.

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(*z*) The case alluded to is *Ross* v *Ross*, 1 Cha. Ca. 171.

19. Ves. 8.
(a) 2. Ch. 263.

CASE 196.

PEYTON *versus* BURY.

At the Rolls. 2 Eq. Ca. Ab. 214. pl. 9. Sel. Ca. Cha. 37.

One devises the residue of his personal estate to J. S. provided she marries with the consent of his two executors; on the death of one, the condition (being a subsequent one) is become impossible, and she may marry without the consent of the survivor.

ONE by will bequeathed the residue of his personal estate to *Jane Styles*, provided she married with the consent of *A.* and *B.* his executors, (who were but executors in trust) and if *Jane Styles* should marry otherwise, then the testator devised over the said *residuum* to *J. N.* One of the executors died, after which *Jane Styles*, without the consent of the surviving executor, intermarried with a common mariner; whereupon *J. N.* brought his bill for the *residuum*.

Insisted for the plaintiff, that this was a condition precedent, which was not to vest any thing in *Jane Styles* until her marriage with the consent of both the executors, and she, not having married with such consent, was not entitled to the *residuum*, consequently the same was well devised over to the

plaintiff. Or taking it to be a condition subsequent, still *Jane Styles* ought to have performed it *cy pres*, as near as might be to the intent of the condition, by having the consent of the surviving executor. That it would be hard, if there were five or six executors, that the death of any one of them should discharge the condition; and it was compared to the case in *Litt. Sect.* 352. If a feoffment be made upon condition to reinfeoff the feoffor and his wife, and the heirs of their two bodies, and for default of such issue, the remainder to the right heirs of the feoffor; if the husband dies living the wife, before any estate in tail made to them, then ought the feoffee by the law to make an estate to the wife as near the condition as possible, (viz.) to the wife for life, without impeachment of waste, remainder to the heirs of the body of the husband on her begotten, remainder to the right heirs of the husband; so here, though *Jane Styles* could not have the assistance and advice of both the executors (one being dead) yet ought she to have taken the advice of him who was living.

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Master of the Rolls: It is very clear, that the plaintiff the devisee over has no title to the *residuum*. 1*st*, In the nature of the thing, and according to the intention of the testator, this could not be a condition precedent, for at that rate the right to the *residuum* might not have vested in any person whatever for twenty or thirty years after the testator's death; since both the executors might have lived, and *Jane Styles* continued so long unmarried, during all which time the right to the *residuum* could not be said to be in the executors, they being expressly mentioned to be but executors in trust. Besides, the bequest of the *residuum* is first to *Jane*, which, if the will had stopped there, would have been an absolute devise, so that the following condition annexed must be a subsequent, not a precedent one. Now the (*a*) rule of law is, that if there be a subsequent condition which becomes impossible by the act of God, this excuses and discharges the grantee from the condition; *lex non cogit ad impossibilia*, which construction ought the rather to prevail, with regard to a condition so odious as that in the present case is, which restrains the freedom of marriage, and is (*b*) void by the civil law, when annexed to a (1) personal legacy. The plaintiff

(*a*) Vide 1 Inst. 206.

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(*b*) Vide ante, 528. 531.

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(1) Vide *Bellasis* v. *Ermine*, 1 Cha. Ca. 22. *Fry* v. *Porter*, 1 Cha. Ca. 138. *Jervoise* v. *Duke*, 1 Vern. 19. *Stratton* v. *Grymes*, 2 Vern. 357. *Aston* v. *Aston*, 2 Vern. 452. *Creagh* v. *Wilson*, 2 Vern. 572. *Gillet* v. *Wray*, ante 1 vol. 284. *Piggot* v. *Morris*, Sel. Ca. in Cha. 26. *Semphill* v. *Bayly*,

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by his bill comes to establish a forfeiture, and would have the Court add those words to the will which the testator might, but did not think fit to insist upon, that *Jane Styles* should not marry without the consent of the executors *or of the survivor of them*, and which the testator might omit upon good reason; as intending that both the executors should confer together about the marriage of *Jane Styles*, in order that the one by arguments might convince the other touching the suitableness of a match, which cannot now be done when only one is left.

Where there is a condition that a feme shall marry with the consent of two executors, and one without reason is against the match, the Court will dispense with his consent.

His Honour farther observed, that he had known the case happen, where the consent of both the executors being required by the will, one, on a proper match being proposed, did consent, but the other was obstinate and would not; which being laid before the Court, and the dissent of the executor appearing to be without a just cause, the want (1) of such consent was supplied. That this was not like the case put out of *Littleton*, of the feoffment which ought to be made *cy pres*, &c. because there the first feoffee was not intended to keep the estate to his

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Pre. Cha. 562. *King* v. *Withers*, Gilb. 26. *Harvey* v. *Aston*, Ca. temp. Tal. 212. Com. Rep. 726, and 1 Atk. 361. S. C. (*z*). *Pullen* v. *Ready*, 1 Wils. 21. *Underwood* v. *Morris*, 2 Atk. 184. *Daley* v. *Desbouverie*, 2 Atk. 265. *Elton* v. *Elton*, 1 Wils. 159. *Chauncy* v. *Graydon*, 2 Atk. 616. *Reynish* v. *Martin*, 3 Atk. 330 (*y*). *Wheeler* v. *Bingham*, 3 Atk. 364. and 1 Wils. 135. S. C. *Long* v. *Dennis*, 4 Burr. 2052. 1 Blac. Rep. 630. *Hemmings* v. *Munckley*, 1 Bro. C. C. 303 (*x*). *Scott* v. *Tyler*, 2 Bro. C. C. 431 (*w*). in which several other cases were cited (*v*).

(1) Vide *Harvey* v. *Aston*, 1 Atk. 375. *Graydon* v. *Hicks*, 2 Atk. 16 (*t*).

(*z*) S. C. Willes, 83.

(*y*) S. C. 1 Wils. 130.

(*x*) S. C. 1 Cox, 38.

(*w*) S. C. 2 Dick. 712.

(*v*) *Merry* v. *Ryves*, 1 Eden, 1. *Stackpole* v. *Beaumont*, 3 Ves. 98. *O'Callaghan* v. *Cooper*, 5 Ves. 117. *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230. *Knight* v. *Cameron*, 14 Ves. 389. *Clarke* v. *Parker*, 19 Ves. 1. *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225. *Polloek* v. *Croft*, 1 Mer. 181. *Lloyd* v. *Branton*, 3 Mer. 108. *Marples* v. *Bainbridge*, 1 Madd. 590. *Malcolm* v. *O'Callaghan*, 2 Madd. 349. *Worthington* v. *Evans*, 1 S. & S. 165. *Long* v. *Ricketts*, 2 S. & S. 179. A condition in a will requiring the consent of executors, &c. to the marriage of the legatee is satisfied by her marriage in the life of the testator with his consent, or even subsequent approbation. *Crommelin* v. *Crommelin*, 3 Ves. 227. *Parnell* v. *Lyon*, 1 V. & B. 479. *Wheeler* v. *Warner*, 1 S. & S. 304. See also *Duffield* v. *Elwes*, 1 S. & S. 242. And such a condition when once satisfied by marriage with consent of the executor, will not revive upon the legatee's becoming a widow. *Hutcheson* v. *Hammond*, 3 Bro. C. C. 146.

(*t*) *Dashwood* v. *Lord Bulkeley*, 10 Ves. 245. *Clarke* v. *Parker*, 19 Ves. 11. *Goldsmid* v. *Goldsmid*, 19 Ves. 368, Coop. 225.

own use, but only as an instrument or conduit-pipe for conveying it back to the feoffor and his family, of which, whilst any were left, the re-infeoffment ought to be made as near the intent of the condition as might be; but in the present case, *Jane Styles* was to take the devise of the surplus to her own use. Moreover, this consent directed to be had being like a bare (*a*) authority, * and so different from that which is coupled with an interest, could not survive, without express words for that purpose (*z*).

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In what cases a condition is to be performed cy pres.

(*a*) Vide ante 103. Mr. Justice Eyre v. Countess of Shaftesbury.

Wherefore thinking this a frivolous bill, *his Honour* dismissed it with costs (1).

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(1) Reg. Lib. B. 1730. fol. 391.

(*z*) *Townsend* v. *Wilson*, 1 B. & A. 608. 3 Madd. 261. See Co. Litt. 113 a, Hargrave's note 2. Sugden, Powers, Ch. 3. s. 2.

44. Ch. D 273.

LANGFORD *versus* PITT.

CASE 197.

At the Rolls.

One articles to buy certain lands, he thereby becomes seised thereof in equity; but where A. devised all his real and personal estate, and afterwards articled to purchase lands, and then died, the heir at law was held to be entitled to this estate, as not passing by the will; secus had the articles for the purchase been before the will, for then the estate would have passed.

UPON a bill brought by the plaintiff for the performance of articles for a purchase, the case was: The plaintiff *Langford*, vicar of *Axminster* in *Devon*, did by attorney enter into articles with Governor *Pitt* for the sale of lands in *Cornwall*. The articles were dated *November* 1725, whereby the plaintiff agreed to convey the premises to the Governor and his heirs, on or before *Lady-day* then next, at the costs and charges of the Governor, and as counsel should advise; upon the making of which conveyance the Governor covenanted to pay 1500*l.* to the plaintiff.

Governor *Pitt* lived until after *Lady-day*, but in 1722, long before the executing of these articles, made his will, by which he devised all his real estate to his son *Robert Pitt* for life, remainder to his eldest son *John Pitt* for life, remainder to his first, &c. son in tail male successively, with several remainders over, bequeathing all his personal estate to trustees, to be invested in lands and settled as above; and dying soon after *Lady-day* 1726, his said eldest son and heir laid claim to the premises, as descending to him, and made his will, wherein by

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express words he devised the premises thus articled to be purchased, to his wife and others, in trust to pay his debts, &c.

[630] and soon afterwards died, leaving *John Pitt* his son and heir, to whom the Governor had devised all his estate expectant on the death of *Robert Pitt* the son.

The plaintiff *Langford* brought this bill against the executors of the Governor, the executors of *Robert Pitt* the son, and against *John* the grandson, to be paid the 1500*l.* purchase money; and though it appeared in the cause by the plaintiff's own witness, that in 1728, the plaintiff had paid to his eldest brother's daughter (being the heir general of the family) 750*l.* for her joining with her husband in a deed and fine to the use of the plaintiff and his heirs, (*note;* the witness said, this was rather to clear up the title than that it was necessary) from whence the defendant's counsel urged it to be evident, even by the plaintiff's own shewing, that he had not at the time of entering into the articles a good title to the premises:

Yet, by the *Master of the Rolls*, it is sufficient if the party entering into articles to sell has a good title at the time of the decree, the direction of the Court being in all these cases to inquire whether the seller *can*, not whether he *could* make a title at the time of executing the agreement (*z*). In the case of Lord *Stourton* versus Sir *Thomas Meers*, the Lord *Stourton* at the time of the articles for a sale, or even when the decree was pronounced, could not make a title, the reversion in fee being in the Crown; and yet the Court indulged him with time more than once for the getting in this title from the Crown, which could not be effected without an act of parliament to be obtained in the following sessions; however it was at length procured, and Sir *Thomas Meers* decreed to be the purchaser. Indeed it would be attended with great incon-

1. Ves. C. 611.

(*z*) So *Jenkins* v. *Hiles*, 6 Ves. 655. *Wynn* v. *Morgan*, 7 Ves. 202. *Seton* v. *Slade*, 7 Ves. 265. But see *Lechmere* v. *Brasier*, 2 Jac. & W. 289. The defendant however is entitled to an inquiry *when* the plaintiff could make a title, with reference to the question of costs. *Harford* v. *Purrier*, 1 Madd. 532. *Daly* v. *Osborne*, 1 Mer. 382. *Birch* v. *Haynes*, 2 Mer. 444. It is laid down in *Gibson* v. *Clarke*, 2 V. & B. 103. that in strict practice this inquiry ought not to be directed till after the Master's report on the title. But the Court of *Chancery* has in later cases held that a direction for this inquiry should be inserted in the order to refer the title, *Jennings* v. *Hopton*, 1 Madd. 211. *Anon.* 3 Madd. 495; and if then omitted, has refused to supply the omission by another order, *Hyde* v. *Wroughton*, 3 Madd. 279. As to the practice in the *Exchequer*, see *Lubin* v. *Lightbody*, 8 Price, 606.

veniences, were decrees to direct an inquiry, whether the contractor to sell had at the time of entering into such contract a title; for thus all incumbrances and defects must be raked into; wherefore it has been thought sufficient to answer the end, if at the time of the decree or report the seller can make a good title (*z*), and accordingly it is usual for the report to mention, that if such a third person joins, the title will be good (*y*).

Then the question was between the defendants, whether the devisees of *Robert Pitt* the son, or the grandson, under the will of the Governor, were entitled to the lands thus articled to be purchased, for it was agreed that the purchase money was to be paid by the executors of Governor *Pitt*.

And for the latter it was objected by the *Attorney* and *Solicitor General*, that when the Governor by his will devised all his real, and also his personal estate to be laid out in land, and all this to be for the benefit of his grandson *John*, after the death of his son *Robert Pitt*, either in one shape or other, these lands thus agreed to be purchased by the Governor should pass; that nothing could be plainer than his intention to dispose of all his estate both real and personal; and Mr. *Solicitor* cited the case of *Greenhill* versus *Greenhill*, 2 *Vern.* 679. by which it is decreed, that where a man articles to buy land, this gives the party contracting an equitable interest in such land, which he may devise, though before the day on which the conveyance is to be made.

Master of the Rolls: I admit the case of (*a*) *Greenhill* and *Greenhill*, in which I myself was of counsel, to have been so determined; but this material difference is observable between the two cases: there the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but in the present case Governor *Pitt*'s will was made prior to the articles for this purchase, before he had any equitable interest in the land, consequently (1) when he had no kind of title he could devise nothing; so that this interest in the premises

(*a*) See also Preced. in Chan. 320.

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(1) Vide *Green* v. *Smith*, 1 Atk. 572. *Potter* v. *Potter*, 1 Vez. 437 (*x*).

(*z*) See *Coffin* v. *Cooper*, 14 Ves. 205.

(*y*) But see *Lewis* v. *Loxam*, 1 Mer. 179, 726.

(*x*) See *Capel* v. *Girdler*, 9 Ves. 509. *Broome* v. *Monck*, 10 Ves. 597. *Earl of Radnor* v. *Shafto*, 11 Ves. 448. *Gaskarth* v. *Lord Lowther*, 12 Ves. 107. *Holmes* v. *Barker*, 2 Madd. 462.

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gained by the Governor's articles must have descended to his son *Robert Pitt* as heir at law, who might well devise the same; and though it may at first look strange, that when the Governor devised all his real and personal estate, these words should not carry *all*, yet it will not seem strange, when it is considered that an estate purchased after the will cannot pass thereby; now these articles are as a purchase subsequent, and though the Governor's executors are to pay for such purchase, they cannot have the benefit of it, being to advance the money only as a debt due from their testator.

One articles to buy lands and dies; his executors shall pay the money, but the heir shall have the lands.

Decree (1) the Master to inquire, whether the plaintiff can make a title; if he can, the purchase money to be paid by the Governor's executors out of his assets; the Master to see who has been in possession since *Lady-day* 1726, at which time the purchase money was to be paid and the conveyance completed; interest and costs to be reserved †.

† On appeal to the *Lord Chancellor*, this decree was affirmed.

(1) Reg. Lib. B. 1730. fol. 423.

CASE 198.

BLACKBOURN *versus* WEBSTER & al'.

At the Rolls. 2 Eq. Ca. Ab. 750. pl. 3. An order of vestry is made for building a work-house in a parish, and that in case any one will lay down the money, the parish shall repay: Equity will decree a parish rate to be made to re-imburse the party who lays down this money.

THE inhabitants of the parish of *Horn-Church* in *Essex*, being minded to build a work-house for setting the poor to work, a vestry was called and held the 4th of *April* 1720, when it was agreed to * build the work-house, and to lay out a sum not exceeding 300*l.* in building the same; that the money should be borrowed, and that whoever was bound for it should be indemnified by the parish. And by another order of vestry made the 8th of the same month the first order was confirmed, both being signed by the vicar and several inhabitants of the parish.

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In pursuance of these orders, 300*l.* was borrowed of Sir *Thomas Webster*, and the plaintiff, together with one *Hunt* (who is since dead insolvent) became bound for the payment thereof, with interest: the 300*l.* and more was laid out in building the work-house, which became beneficial to the parish, the poor's rates being thereby lessened. Several orders of vestry were afterwards obtained for making rates for relief of

the poor, which were collected, but no part of the debt paid, by reason that some persons who came into the parish after the work-house was built, opposed the payment, and in particular, when an order of vestry was made for levying a rate for relieving the poor and payment of this debt, they, on an appeal to the quarter-sessions, got the order, which had been made below, to be quashed. The 300*l.* not being paid, Sir *Thomas Webster* put the bond in suit against the plaintiff, who being forced to pay the money, brought this bill against such of the inhabitants as were living, and against the present vicar, churchwardens and overseers of the poor of the said parish, to be relieved and re-imbursed what money he had paid, with interest and costs, and to be indemnified.

The defendants admitted the order, the borrowing the 300*l.* and the building of the work-house, saying they were willing to come into any lawful means within their power for the payment of this debt, but that it had been opposed by some in the parish, who gave out that no rate could by law be made to pay the debts of the parish.

Master of the Rolls: The plaintiff has a very just demand, [634] and it was an unconscionable thing in those who appealed to the sessions. Supposing no rate could by virtue of the 43 *Eliz.* be made for payment of a parish debt, the plaintiff ought not however, in a case of this nature, to be without a remedy. Wherefore decree him his principal, interest, and costs at law and in this Court; and that the defendants the vicar, churchwardens and overseers of the poor of the parish, do call a vestry to make a rate for the payment thereof; and in case any of the inhabitants shall refuse paying what they shall be rated, the plaintiff to be at liberty to apply to the Court (1); since I do not see why the Court may not as well compel those who are not parties to pay the rate, as order tenants, though not parties, to pay their rents, and forasmuch as the defendants have put in a fair answer, decree them their costs to be raised by the said rates; but if those who had appealed to the quarter-sessions had been before the Court, they should have paid all the costs (2).

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(1) "To compel such parishioners to "pay their proportions of the said rate, "*or* for a sale of the land, on which "the said work-house is built." Reg. Lib. A. 1730. fol. 509.

(2) But in *Greenfield* v. *Reynall* before Lord *Thurlow* on 21st of *November* 1780, where a similar bill was filed against the inhabitants of *Horsham* in *Sussex*, his Lordship doubted the authority of *Blackbourn* v. *Webster*, and said he would not make such a de-

cree; but there being a want of parties, the cause stood over, and was never brought on again; et vide *Batteley* v. *Cook*, Pre. Cha. 42. The *King* v. *Wavell*, Doug. 116 (*z*).

(*z*) *French* v. *Dear*, 5 Ves. 547. *Ex parte Fowlser*, 1 Jac. & W. 70. *Rex* v. *Chapel-wardens of Haworth*, 12 East, 556. *Lanchester* v. *Tricker*, 1 Bing. 201. *Lanchester* v. *Frewer*, 2 Bing. 361. *Lanchester* v. *Thompson*, 5 Madd. 4.

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DE

TERM. S. MICHAELIS, 1731.

CASE 199.

Ex parte LUDLOW.

Lord Chancellor KING.

2 Eq. Ca. Ab. 582. pl. 4.

MR. *Ludlow*, late a bencher of the *Temple*, having a daughter *Elizabeth*, who was found a lunatic, and being seised of a real estate of near 500*l.* per annum, and possessed of a personal estate amounting to about 600*l.* by will made his sister Mrs. *Bathurst* executrix and residuary legatee, in case his daughter should not recover from her lunacy; but if she did, then the daughter to be executrix and residuary legatee, and to remain under the care of Mrs. *Bathurst* during the continuance of her insanity of mind. Afterwards Mrs. *Bathurst* made her will, appointing thereby one *Robert Bog* of *Doctors Commons* her executor and residuary legatee, and devised, as far as in her lay, the custody of her niece the lunatic to the said Mr. *Bog*, who having proved the will, and under colour thereof got the lunatic under his care, petitioned the Court for the custody of the person.

[636] On the other hand, *Henry Strangeways*, who was cousin of the lunatic, viz. the lunatic's grandfather's sister's second grandson, petitioned for the custody of the person, as did also Mrs. *Rachel Masters*, who was another second cousin of the lunatic, viz. the lunatic's grandfather's youngest sister's granddaughter, and sister of Sir *Harcourt Masters*.

1*st*, For Mr. *Bog* it was insisted, that though the devise of Mrs. *Bathurst* the aunt was not good in law, yet it might amount to a recommendation of him to the Court by one who as she was a near relation, and herself intrusted with the care of the lunatic, by her own father, must be supposed best to

know the lunatic, and such recommendation would be of weight with the Court. That Mrs. *Bathurst*, being the father's executrix, stood in his place, consequently it was as the father's own appointment, more especially when the other two competitors were not unexceptionable; for as it was an exception to the heir that he should not be intrusted with the custody of the person, since he was to be a gainer of the real estate by the death of the lunatic, so these two competitors, being two of the next of kin, would, on her death, come in for a share of the personal estate, under the statute of distribution, the value of which might happen to be more than that of the land; or at least, supposing the personal estate were to increase by the continuance of the lunatic's life, it was their interest however that her lunacy should continue, and she remain incapable of making a will.

2*dly*, For Mr. *Strangeways* it was alleged, that he was an house-keeper, a person of a very fair character, and several affidavits were read proving the great liking and affection which the lunatic took to her cousin *Strangeways*, and the [637] great dislike and aversion she had to Mrs. *Masters*, which arose (as was conceived) from her brother Sir *Harcourt Masters* (one of the directors of the *South-sea* in 1720,) having drawn in the lunatic's father to put his substance into the *South-sea*, where a great part of it was lost; and that thereupon it had been the usual expression of the father, that Sir *Harcourt Masters had drawn him into a secret.*

But taking this in the best sense, even supposing Sir *Harcourt* did not by any indirect means induce the father to be an adventurer in the *South-sea*, yet if upon this, or any other (though a groundless) occasion, the lunatic had entertained such thoughts, (and she plainly appeared to be uneasy when in the custody of any of the family of the *Masters*, and raved, becoming much disordered at the sight of them) all this would be regarded by the Court, which would use its endeavours to make these unfortunate persons as easy as possible. And several affidavits were read, proving, that whenever Mr. *Strangeways* appeared, the lunatic, though before in her furious fits, would on a sudden grow calm; wherefore, as committing her to the care of *Strangeways* might facilitate her cure, or make her more easy under the continuance of her distemper, so the placing her with one for whom she had an aversion, might (it was said) prevent her cure, or retard it, and make her more uneasy in the mean time.

3*dly*, On behalf of Mrs. *Masters* affidavits were produced,

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shewing that the lunatic's expressions of aversion to the family of the *Masters*'s were only in her raving fits, at which time she would use all her relations alike ill.

Father or uncle devises the custody of a lunatic son or nephew who is above 21, this void.

Lord Chancellor: As to the will of Mrs. *Bathurst* devising the custody of her niece to Mr. *Bog*, it is absolutely void; the father himself could not make such a will, though he might dispose of the guardianship of his child till twenty-one, yet after that age (which is the present case) he had no such power; and taking the will out of the case, Mr. *Bog*, being no relation, is as a mere stranger, consequently against the near relations of the lunatic he can have no pretence of claim to the custody of the person.

The Court will not grant the custody of the lunatic's person to the next heir; but the being entitled to a share of the personal estate by the statute of distribution, is no objection.

(*a*) See Mr. Justice Dormer's case, ante 261.

(*b*) See Neal's case, ante 544.

It is true, when the party seeking the custody of the lunatic's person has been heir at law, or next entitled to the real estate after the lunatic's death, this has prevailed as an objection, though much more considerable formerly than of (*a*) late: but the being next of kin, so as to be entitled to a share of the personal estate of the lunatic, is (*b*) no objection, nor do I remember it ever to have prevailed; for the personal estate in all probability will increase by the continuance of the lunatic's life, consequently it must be for the advantage of the committee to preserve such life, and to be more careful and tender of it. In the present case the degree of relation is equal, which may seem to entitle both the competitors: but as I have found by experience, that granting the commitment to two has been attended with inconveniences, by occasioning suits, and putting the estate to great expense (*z*); and since Mrs. *Masters*, being of the same sex, may probably better know how to take care of the lunatic, and in this respect be more tender of her; let the custody of the lunatic's person be granted to her second cousin Mrs. *Masters* in preference to her other second cousin Mr. *Strangeways*.

Inconvenient to grant the custody of a lunatic to two.

(*z*) This objection is not now attended to. Collinson on Lunacy, 1 vol. 227, and Appendix, passim.

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MILNER *versus* COLMER.

CASE 200.

Lord Chancellor KING.

THE defendant *Colmer* was a younger brother of a good family, and a thriving tradesman and freeman of *London*. The

2 Eq. Ca. Ab. 146. pl. 4. Husband marries an infant entitled to a great personal estate, pending a bill for an account of such estate, and applies to the Court for his wife's portion, which directs him to make his proposals before the Master; the Court accepts proposals from the husband to settle only part of her fortune on the wife and her issue.

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plaintiff's late husband Mr. *Milner* was a very rich merchant, a freeman of *London*, and died intestate, leaving the plaintiff his widow and several children. There had been for some time a suit depending in Court, wherein an account was decreed to be taken of Mr. *Milner*'s personal estate, one third of which, according to the custom, was decreed to the wife, the other two thirds to the children. And the defendant *Colmer* having, without the consent of the Court, or of the mother, married one of the infant daughters of Mr. *Milner*, whose portion was 14,000*l.* and applying to the Court for his wife's portion, he was sent to a Master to make proposals as to the settlement which he was willing to make on his wife; whereupon Mr. *Colmer* offered to settle 4000*l.* part of his wife's own fortune, on him and her and her issue; and further to be bound, in case his elder brother, who had then no issue, should die without issue male in his the defendant *Colmer*'s life-time, to settle 500*l.* per annum, of the family estate upon his said wife for her jointure, alleging that, he being a freeman of *London*, the custom of the city was alone a provision for his issue.

The matter coming on upon this report, it was insisted on for the defendant, that this portion of the wife's being personal estate, the right thereto by law vested in the husband, and that it was somewhat extraordinary for a court of equity to interpose or meddle where the law gives a plain title to the husband, especially where the husband was a person in trade, [640] a thriving man, of a good family, and proposed to settle some part of the money, so far as to secure against want both the wife and children; that the rest would probably turn to better account in the way of trade, even to the wife and her children, than if vested in a purchase and settled. That the covenant to settle 500*l.* per annum, pursuant to a power in the family settlement, was a considerable addition, there being but one brother before the defendant, who was beyond sea, had no child as yet, nor was likely to have any by his lady, who did not live with him; and then not only the 500*l.* per annum jointure would be made, but the family estate, which was 1000*l.* per annum in *Warwickshire*, would come to the defendant *Colmer* and his children (if sons) by this wife. That the husband's being a freeman of *London* has been thought a considerable ingredient, and therefore several persons have been ordered (*a*) to take up their freedom, to the intent their wives and children might be entitled to their provisions by the custom of *London*; and though the freeman might lay out his personal estate in land, yet tradesmen are not apt to take their money

(*a*) See the case of Frederick v. Frederick, vol. 1. 710.

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out of trade, which generally yields greater profit, and to invest it in land, where the annual income is frequently very inconsiderable in comparison of the profit arising by trade.

That if the sole reasonable occasion of the interposition of the Court in this case was the defendant's wife being then an infant, she was now of age, and present in Court, ready to give her consent that her husband should have the residue of her portion; which consent of hers before a judge, upon a fine, would devest her of any *real* estate, *a fortiori* would such consent when given by her before the *Lord Chancellor* himself, be
[641] sufficient to put an end to such interposition of the Court, and induce it to permit the defendant to receive what by law he was before entitled to, the personal estate.

Though where the husband has a legal title to his wife's personal estate, equity will not interpose in prejudice of such right; yet where he cannot get at it without the assistance of this Court, it will put terms upon him.

On the other side it was said to be the settled distinction, that where the husband has a legal title to the wife's personal estate, which he can come at by law without the aid of equity, this Court will not in such case interpose: but where the application by the husband is in equity, for his wife's portion in the hands of the Court, or perhaps of a receiver, there, if the husband will *have* equity, he must *do* equity. That the present case was much stronger, the Court having actually referred it to a Master to receive proposals, and the husband, in consequence thereof, having made them; all which would be vain, were the husband to have his wife's portion upon a supposition of being entitled to it by law; that now the only question was, whether the proposals were reasonable or not, and the same as if before the marriage they had been made to the parent or guardian of the lady; the Court being now her guardian, and *in loco parentis;* and it would hardly have been thought a reasonable proposal, had the husband offered to settle not above a third part of his wife's own portion; that the covenant to settle a jointure of 500*l.* per annum, part of the family estate, when in possession, was entirely precarious; the brother might have issue by this or by any other wife, or might survive the defendant; in any of which cases, the defendant's power of making a jointure, being to take effect only when in possession, his covenant for that purpose would be of no signification. Also as to the custom of *London*, that was said to be as precarious, the freeman might dispose of his personal estate, contract debts, might miscarry in the world, or realize his effects; in any of which cases the custom would not take place; and though the gains
[642] in trade might sometimes be considerable, yet money employed in trade was also subject to very great accidents; for which reasons it was hoped that the portion which the wife brought,

or at least more of it than had been offered by the husband, should be invested in lands or settled (1).

Lord Chancellor said, he thought it extraordinary that this Court should interpose against the husband in cases where the law gives him a title to the wife's personal estate; and doubted, experience had shewn, that such interposition, unless where the husband has appeared to be a profligate or extravagant man, had been the occasion rather of mischief than good.

Whereupon his Lordship examined the wife in Court as to her consent, asking her, whether she understood the proposals made by her husband; which she repeated to the Court, and made it appear she did understand them; adding, that her husband had been put to great charge, trouble and loss of time in this suit, for which reason she desired that without more trouble he might have the remainder of her portion, she being satisfied he had intentions to do more for her.

Then his Lordship recommended it to the husband to add to his proposals; but he answering, that he could not conveniently do it (2),

The Court said, the covenant to make a jointure of 500*l.* per annum, when in possession of the family estate, though contingent, was yet to be considered and valued; and therefore directed that the defendant giving such covenant, the residue of the portion, deducting the sum proposed to be invested in land and settled as above, should be paid to him (3).

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(1) Vide *Jacobson* v. *Williams,* ante 1 vol. 382. *Bosvil* v. *Brander,* ante, 1 vol. 458. *Winch* v. *Page,* Bunb. 86. *Harrison* v. *Buckle,* 1 Stra. 239.

(2) But by the Register's book it appears that *Colmer* did in Court propose that 5000*l.* part of the wife's fortune should be laid out in lands to be settled on them and the issue of the marriage in such manner as the Court should approve, *and also* that the wife's share (being one third) of a sum of 12,925*l.* 12*s.* 3$d\frac{1}{2}$. due from one of the defendants to the testator's estate, should be invested in like manner, when the same should be paid in—and the order is drawn up accordingly. Reg. Lib. B. 1731. fol. 99.

(3) Vide *Adams* v. *Pierce,* post. 3 vol. 11. *Willatts* v. *Cay,* 2 Atk. 67. *Ex parte Higham,* 2 Vez. 579 (*z*).

(*z*) *Brown* v. *Elton,* post. 3 vol. 202. See also *Wright* v. *Rutter,* 2 Ves. jun. 673. *Macaulay* v. *Phillips,* 4 Ves. 17. *Murray* v. *Lord Elibank,* 10 Ves. 90, 13 Ves. 1. *Lloyd* v. *Williams,* 1 Madd. 450. *Long* v. *Long,* 2 S. & S. 119. *Austen* v. *Halsey,* 2 S. & S. 123 n. The effect of the examination and consent of a *feme-covert* in a court of equity is to waive her equitable right to have a settlement made on her out of a fund which her husband, although the legal title is vested in him as such, cannot reach without the assistance of a court of equity. The Court cannot, therefore, in this manner enable a wife to dispose of a reversionary or contingent interest, for there the husband has

no legal right; nor to waive her claim under an existing settlement, the examination not having, as seems to have been supposed in *Frederick* v. *Hartwell*, 1 Cox, 193, and *Macarmick* v. *Buller*, 1 Cox, 357, any analogy to a fine at law. *Frazer* v. *Baillie*, 1 Bro. C. C. 518. *Sperling* v. *Rochfort*, 8 Ves. 164. *Richards* v. *Chambers*, 10 Ves. 580. *Woollands* v. *Crowcher*, 12 Ves. 174. *Pickard* v. *Roberts*, 3 Madd. 384. *Johnson* v. *Johnson*, 1 Jac. & W. 472. Nor will such examination and consent be of any avail, where the fund is the separate estate of the wife, or one over which she has a power of appointment. For if the disposition intended is within her power, no examination or consent is necessary, *Sperling* v. *Rochfort*, *Richards* v. *Chambers*, ub. sup.; if beyond it, no examination or consent will authorize it. *Sockett* v. *Wray*, 4 Bro. C. C. 483. *Richards* v. *Chambers*, ub. sup. *Ritchie* v. *Broadbent*, 2 Jac. & W. 456. The Court will not receive the feme-covert's consent till the amount of the fund is ascertained. *Edmonds* v. *Townsend*, 1 Anst. 93. *Sperling* v. *Rochfort*, *Woollands* v. *Crowcher*, ub. sup., *Jernegan* v. *Baxter*, 6 Madd. 32. Where the sum applied for is under 200*l.* the Court does not require the appearance of the wife. *Elworthy* v. *Wickstead*, 1 Jac. & W. 69. See, as to the mode of taking the wife's consent in the country, *Tasburgh's Case*, 1 V. & B. 507; abroad, *Minet* v. *Hyde*, 2 Bro. C. C. 663, *Bourdillon* v. *Adair*, 3 Bro. C. C. 237. *Campbell* v. *French*, 3 Ves. 321.

CASE 201.

HOBART *versus* ABBOT.

Lord Chancellor KING.

2 Eq. Ca. Ab. 169. pl. 24. An old mortgage is made to B. for 350*l.* who in 1705, makes an under mortgage to C. for 300*l.* C. brings a bill to foreclose; B. the original mortgagee, or in case of his death his representative, ought to be made a party.

IN a bill to foreclose, the case was: *A.* made a mortgage for a term of 500 years for securing 350*l.* interest to *B.* who so long since as 1705 assigned the term to *C.* redeemable by himself on the payment of 300*l.* *B.* died, *C.* brought a bill against *A.* to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the representatives of *B.* the original mortgagee parties.

Cur': Here is plainly a want of proper parties, *B.* had a right to redeem *C.* and to prevent another account, as to what is due upon the original mortgage, his representatives ought to be before the Court (1) (*y*).

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(1) Reg. Lib. A. 1731. fol. 99.

(*y*) See *Bishop of Winchester* v. *Beavor*, 3 Ves. 314. *Norrish* v. *Marshall*, 5 Madd. 478.

TAYLOR *versus* ATWOOD.

CASE 202.

Lord Chancellor KING.

2 Eq. Ca. Ab. 756. pl. 12. Where an infant is defendant, the service of the subpœna to hear judgment must be on the guardian, not on the infant.

WHERE an infant is defendant, the affidavit of service to hear judgment must be, that the guardian was served, not the infant, and this (as it seems) though the infant be above fourteen, or want ever so little of twenty-one; and the serving of the infant is not good, for *non constat* but the infant might be in his cradle; or should it appear by the bill that he is near twenty-one, yet being not able to defend himself, the service must be on the person appointed by the Court to defend him (*x*).

(*x*) So *Freeman* v. *Carnock*, 2 Dick. 439.

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CASE 203.

Lord Chancellor KING.

2 Eq. Ca. Ab. 7. pl. 17. 588. pl. 3. Account of profits from what time, where from the time of the title accruing, and where only from filing the bill.

THE King under the duchy seal granted to Mr. Serjeant *Bennet Kingsland* Park in *Hampshire* for twenty-one years, which expired at *Michaelmas* 1728. Serjeant *Bennet* by his will devised the leasehold premises to his youngest son *Thomas Bennet* (the Master in Chancery) and made his eldest son *John Bennet* (another Master) his executor, and died 23 *Dec.* 1723. *Thomas Bennet*, the younger son and devisee of the leasehold, in 1728, brought his bill against the defendant (*inter al'*) for the mesne profits of part of the premises, having himself been in possession of the other part from his father's death; and it appearing, that a counterpart of a lease was delivered by one who had been the defendant's agent to the plaintiff *Bennet*, by which the premises in question were formerly leased by the Crown under the duchy seal to the defendant *Whitehead*, which counterpart was executed by the defendant himself, and now produced; and the lands therein mentioned being the same as were granted by the latter lease to Mr. Serjeant *Bennet:* this satisfied the Court of the plaintiff's right; wherefore the defendant (who pretended to the inheritance of the premises) was decreed to account with the plaintiff for the profits.

But then the question was, from what time this account should be taken, whether from the filing of the bill only, or from the death of the plaintiff's father, at which time the plaintiff's title accrued?

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And it was objected, that the bringing of the bill was to be looked upon as an entry of the plaintiff upon the premises, from which time only he should be entitled to the profits. Indeed in case of a third person's entering upon the lands of an infant, such infant, when he comes of age, shall by a bill in equity recover the profits from the time of the first entry; but the reason is, because where one enters on an infant he is chargeable as bailiff or guardian, and no laches shall be imputed to the infant; wherefore it will be construed as if he had entered as soon as his right accrued; whereas it might reasonably be imputed as laches to the plaintiff Mr. *Bennet*, that he did not bring his bill before; that as the Court might go back five years before the bringing of the bill, by the same reason it might go back twenty-five or fifty years; besides, the account ought not to be decreed without an issue first directed to try, whether the premises in question were part of the premises comprised in the lease under the duchy seal, (viz.) part of *Kingsland* Park, in regard the subsequent lease made to Serjeant *Bennet* from the year ——, would by the same reason bind the premises; and the defendant pretended to an inheritance therein, which ought not to be affected without a trial. Farther, the plaintiff claimed title to the leasehold premises without shewing an assent to the devise thereof by the executor of Serjeant *Bennet*, which he ought to have done.

One in possession of lands belonging to an infant; if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title, and not from the filing of his bill only.

Lord Chancellor: The names of these meadows being expressly mentioned in this lease from the duchy, and being the same which the defendant owns he has been in possession of, they must be intended the same lands, for no one will presume, unless it be proved, that there are two meadows of the same name; then as the plaintiff's right accrued upon his father's death by virtue of the will, he must from that time be * entitled to the rents and profits of the premises; and the rather against the defendant, as he had the deed and counterpart of the lease in his possession which made out the plaintiff's title, and it was the defendant's agent who delivered the deed to the plaintiff; it is sufficiently clear, that the lands in controversy are the very lands comprised in the duchy lease; the defendant or his ancestors having accepted the same, shews they had no other title than under such lease; all which is more evident by the defendant, who now claims the premises as a fee-simple, not being able to shew any deed, fine, conveyance or settlement, by which they were conveyed as fee-simple lands. As to the objection, that the plaintiff claims title to the leasehold without shewing an assent to the devise thereof by the executor of his

The defendant shall account for profits from the time the plaintiff's right accrued, and not from the time of filing the bill only, if the defendant has concealed the deeds and writings making out the plaintiff's title.

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father; it appears the plaintiff was in possession of part of the premises, which is a sufficient proof of the executor's consent, especially when the executor does not appear to have made any claim himself thereto.

Decree the defendant to account with the plaintiff for the rents and profits of the leasehold premises from the death of his father Serjeant *Bennet*, from which time his title thereto accrued by virtue of his father's will (1).

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(1) Reg. Lib. A. 1731. fol. 124. Et vide *Dormer* v. *Fortescue*, 3 Atk. 124. *Lord Townshend* v. *Ash*, 3 Atk. 340 (*z*)

(*z*) But when the defendant has entered into possession under a mistaken idea of title, *Drummond* v. *Duke of St. Albans*, 5 Ves. 439, without fraud, concealment, &c. *Pulteney* v. *Warren*, 6 Ves. 93, the account of mesne profits will only go back for six years, by analogy to the statute of limitations, *Hercy* v. *Ballard*, 4 Bro. C. C. 468. *Reade* v. *Reade*, 5 Ves. 744. *Stackhouse* v. *Barnston*, 10 Ves. 470; even though the plaintiff is an infant, and the defendant a trustee, if he was ignorant of the trust. *Drummond* v. *Duke of St. Albans*, ub. sup. So, if the case is doubtful, *Forder* v. *Wade*, 4 Bro. C. C. 521, or the plaintiff has lain by for a long time, the Court will give the account only from the filing of the bill, *Cook* v. *Arnham*, post, 3 vol. 288. *Pettiward* v. *Prescott*, 7 Ves. 541, or at most for six years, *Harmood* v. *Oglander*. 6 Ves. 215, and in case of very great laches will refuse it altogether, *Acherley* v. *Roe*, 5 Ves. 565. Trust accounts, however, are not generally to be limited by analogy to common accounts. *Attorney General* v. *Brewers' Company*, 1 Mer. 495. Nor is there any limitation to accounts, where, as in dower, the plaintiff is not barred at law. *Oliver* v. *Richardson*, 9 Ves. 222. Where an entry is necessary to avoid a fine, the account is limited by the time of the entry. *Reynolds* v. *Jones* 2 S. & S. 213.

6. Sim. 353.

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CASE 204.

Lord Chancellor KING.

2 Eq. Ca. Ab. 59. pl. 6. A deposition of a witness amended after publication.

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ON petition to amend a deposition of a witness (one *Dubourdieu* a clergyman, who had been examined in this cause) the witness was ordered to attend, as was also the examiner, the latter of whom, being examined by the *Lord Chancellor*, swore he took the deposition truly from the mouth of the witness, to whom the deposition was afterwards distinctly read, and then the witness subscribed his name.

The witness being examined did not swear positively that the examiner had taken his deposition false, but that he was induced to believe he did not express himself in the manner the deposition was taken, and was positive he did not intend or mean to swear as the examiner had taken it, but that he really

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intended to swear in the manner as the amendment was desired, and that the same was what he had before declared in conversation; as also what another witness in the cause had positively sworn.

The counsel on the other side, insisted, that though there were instances where a defendant's answer had been amended, (*a*) no precedent could be produced for amending a deposition after publication; or at least if the Court was inclined to amend, this would be better deferred to the hearing, when it would be more fully possessed of the whole matter.

(*a*) Vide 1 Chan. Ca. 25.

Lord Chancellor: Where it appears to the Court, that either the examiner is mistaken in taking the deposition, or the witness in making it, I think it for the advancement of truth and justice, that the mistake should be amended; and the sooner this is done the better, in regard the witness may be dead, or in remote parts, before the hearing; it would be hard and unjust to pin a witness down to what is a mistake, by denying to rectify it. As to what has been objected of the inconvenience of amending the deposition after publication, it was impossible to know it until publication; wherefore let the deposition be amended, as desired, and the witness swear it over again (1) (*z*).

(1) Reg. Lib. A. 1731. fol. 95.

(*z*) See *Rowley* v. *Ridley*, 1 Cox, 281. *Ingram* v. *Mitchell*, 5 Ves. 297. *Kirk* v. *Kirk*, 13 Ves. 285.

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CASE 205.

Lord Chancellor KING.

1 Ch. Rep. 68.

LADY JANE HOLT, Widow of John Holt, Esq., who was Nephew and Heir of the Lord Chief Justice Holt, } Plaintiff;

ROWLAND HOLT, Sen. the next Brother and Heir of the said John Holt, and his eldest son Rowland Holt, } Defendants.

THOMAS GIBSON, Esq. and others, Creditors of the said John Holt, } Plaintiffs;

LADY JANE HOLT, Defendant.

2 Eq. Ca. Ab. 664. pl. 13. Tenant for life, with power to make a jointure of 100*l.* per annum for every 1000*l.* which he has with his wife, covenants on marriage to make a jointure accordingly, and also to make an additional jointure on receiving or becoming entitled to any further money in right of the wife; after the death of the husband the wife becomes entitled to an additional fortune; she shall not compel the remainder-man to make an additional jointure on her on this account; but on the other hand, the husband's creditors shall not take from the wife this additional fortune.

THE bill of the Lady *Jane Holt* was chiefly to have an additional jointure made to her, pursuant to a power created by

the will of the Lord Chief Justice *Holt;* the bill of the creditors of *John Holt* was to be paid their debts out of his assets. The case, as to the power of making a jointure, (and which was the chief question) was thus:

The late Lord Chief Justice *Holt* being seised in fee of a great real estate, made his will 4 *Sept.* 1708, and having no issue, devised his lands to his brother *Rowland Holt* for life, with remainder to *John Holt,* eldest son of the said *Rowland,* for life, remainder to trustees during the life of *John,* to support contingent remainders, with remainder to the first, &c. sons of the said *John* in tail male successively, with remainder [649] to the defendant *Rowland,* younger son of the said *Rowland* the father, for life, with remainder to his first, &c. sons in tail male successively, with divers remainders over, with a power to every tenant for life of the premises when in possession, to make a jointure to any wife whom he should marry, so as such jointure should not exceed 100*l.* per annum, for every 1000*l.* which any wife they should respectively marry should bring as a marriage portion, and so for more, more, &c. The jointure to be for the wife's life, and to commence and take effect from the death of the husband.

The Chief Justice died, *Rowland Holt* the father died, and *John Holt* the son being in possession, and a marriage being agreed upon betwixt him and the plaintiff the Lady *Jane,* one of the daughters of the late Marquis of *Wharton,* the said *John* and Lady *Jane* executed marriage articles, dated the 25th of *May* 1723, which articles recited the power given by the C. J. *Holt*'s will, and thereby, in consideration of 8000*l.* left Lady *Jane* by her father's will, *John Holt* covenanted to settle within a month after the marriage 800*l.* per annum jointure on Lady *Jane* for her life, and also to make her an additional jointure of 100*l.* per annum, for every 1000*l.* which he should receive or be entitled to by virtue of Lady *Jane*'s father or mother's will, and so in proportion for any lesser sum than 1000*l.* Lady *Jane* being then an infant, the articles were signed by her and her guardians. There was also a provision therein, that the residue of the personal estate which Lady *Jane* was entitled to by her father's and mother's will should go first towards payment of *John Holt*'s debts, and afterwards to the said *John Holt.* The marriage was soon after solemnized, and within a month a jointure of 800*l.* per annum was settled on [650] Lady *Jane* for her life.

Afterwards *John Holt* raised 1500*l.* upon a mortgage which he made to some of the plaintiffs of some other part of

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the portion he was entitled to in right of Lady *Jane* his wife, giving his bond for the re-payment of it; and thereupon he made an additional jointure upon Lady *Jane* his wife of lands of 150*l.* per annum by virtue of the power.

5 *Jan.* 1728. *John Holt* died without issue, and the defendant *Rowland* his brother entered upon such part of the late Chief Justice's estate as was not comprehended in the jointure.

Lady *Jane* being by the will of her father the late Marquis of *Wharton*, entitled, together with her sister Lady *Lucy*, to a moiety of the surplus of his personal estate; and likewise by the will of her mother the Marchioness, having a right to some lands in fee-simple in the county of *Tipperary* in *Ireland*, and *John Holt* dying much indebted, it was prayed by the creditors' bill that they might have the benefit of Lady *Jane*'s share of her father's and mother's estate, and that in lieu and recompence thereof she might have an additional jointure made to her after the rate of 100*l.* per annum for every 1000*l.* which they should recover out of her estate towards payment of their demands.

Lady *Jane*'s bill was, that she might have such an additional jointure made to her pursuant to her late husband's covenant; but in case she could not, then that no part of her estate should be taken from her by the aid of equity, unless she had the re-
[651] compence which it was agreed she should have by her marriage articles, viz. after the rate of 100*l.* per annum for every 1000*l.* she should bring.

The only question of difficulty seemed to be, how far the power given by the C. J. *Holt*'s will for every tenant for life to make a jointure, and the covenant by *John Holt* the tenant for life to make a jointure of 100*l.* per annum for every 1000*l.* which his wife the Lady *Jane* should bring, in regard it was not executed by *John Holt* in his life-time, could bind the defendant *Rowland* the remainder-man.

On behalf of the plaintiff it was said, that though the power granted to a tenant for life to charge the remainder, being the estate of a third person, was at law to be taken strictly, yet in a Court of Equity this was plainly otherwise, in cases where the person claiming under such power is a purchaser for a valuable consideration; and therefore if there be tenant for life, with a power to make a jointure by a deed attested by *three witnesses*, and the tenant for life, previous to his marriage, and in consideration thereof and of a portion, does by a deed attested by *one witness* only make a jointure, this, though void

in law, shall be aided in equity. That Lady *Jane* was plainly a purchaser both of the power and of *John Holt*'s covenant to make a jointure, for the most valuable consideration that could be, that of a marriage and a marriage portion, and consequently within all the cases where defective executions of powers are made good in equity. That in the case of *The Countess of Coventry* versus (*a*) *The Earl of Coventry*, it was said by the Lord Chief Baron *Gilbert*, and assented to by the *Master of the Rolls* and the Lord Chancellor *Macclesfield*, that this power of making a jointure given to a tenant for life, is, part of the *old dominion* which the tenant in fee had himself over the estate, and had transferred to the tenant for life; from whence it followed, that such power being part of the ancient dominion which the owner of the estate had over it, the tenant for life, *quoad* the power of making this jointure, should be taken as seised in fee, and in that light nothing could be plainer, than that if one seised in fee were to enter into a covenant to make a jointure of 100*l.* per annum, for every 1000*l.* which his wife should bring, and should die before the making of such jointure, the covenant would be executed in equity, and the jointure directed to be made pursuant thereto.

(*a*) Ante 222.

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That in a Court of Equity, all covenants made on a valuable consideration for the doing of any thing, whether for the conveyance of any estate, making a lease, jointure or settlement, were considered as done and performed, provided he that gave the covenant had a power to perform it.

One exception indeed there was (and but one) to this general rule, which was where a tenant in tail covenanted for a valuable consideration to levy a fine, or suffer a recovery, to the use of the purchaser, and died before the fine levied, or recovery suffered; in which case it was admitted to have been held, that the covenant could not in equity be made good against the issue in tail, or the remainder-man; but this was for a (1) reason which did no ways hold in the principal case, viz. on account of the statute *de donis*, the express words whereof entitled the issue and the remainder-man to the entailed premises, from which act of parliament nothing could deliver those estates-tail, but either common recoveries, which were usefully invented by the Judges to prevent the inconveniences introduced by that act, or by levying of a fine (a remedy provided by subsequent acts of parliament) to bar the estates-tail, though not the remainders, when limited to third

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(1) Vide *Stapilton* v. *Stapilton*, 1 Atk. 9.

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persons. That the covenant by *John Holt*, being for a valuable consideration, and for no more than it was in his power to have performed, ought to be taken as if performed, and consequently bound the remainder-man in the same manner as if executed by the tenant for life. That it could be no objection that Lady *Jane* had already had two jointures made her by her said husband, since these were a recompense only for such part of her portion as had been already raised and answered to her husband; and there was as much reason (because equally within the intent of the articles) that she should have an additional jointure for her additional portion, as that she should have her original jointure for her original portion. That in the Countess of *Coventry*'s case the matter rested only upon marriage articles during the life-time of the late Earl, no jointure reduced to any certainty, and yet upon these marriage articles the jointress was decreed to hold and enjoy her jointure against the remainder-man. It was true in the case last cited, the portion of 10,000*l.* was actually paid before the marriage; whereas in the present case, the certainty of the residue of Lady *Jane*'s portion did not as yet appear; wherefore all that the plaintiffs the creditors now prayed was, that it might be referred to the Master to ascertain the *quantum* of the residue of such portion, by which means the certainty thereof would appear, *id certum est quod certum reddi potest;* and that the present case was the stronger, there having been already a decree pronounced, that the executors of the late Marquis of *Wharton* should account for his personal estate, which account would probably in a short time be taken and finished. In the mean while, it could not with any colour of reason be insisted upon, that the making this additional jointure upon Lady *Jane*
[654] should be deferred until the residue of her portion was actually paid to her husband, or those claiming under him; but that it would be sufficient if the same was secured either by mortgages, government or other securities, so as to be rendered safe; and (as it was said) here the residue of Lady *Jane*'s portion was sufficiently secured by the decree and marriage articles.

On the other side it was insisted, that the Lady *Jane Holt* was not a wife unprovided for, but had already two jointures settled upon her by her husband, one of 800*l.* per annum, and the other of 150*l.* per annum, and there was as much reason for the remainder-man to question the validity of the second jointure, as for the Lady *Jane* to ask a third; in regard the 1500*l.* which was the consideration for *John Holt*'s making

the second jointure, was not money actually paid or secured to him, but what he had raised by a mortgage of part of her portion, for the re-payment whereof he had given his covenant and bond, and was liable to be sued for it; wherefore as yet this 1500*l.* could not be said to be *received*, but only *borrowed* by him; that as to the residue of the portion, it was neither known what it was, how much it would amount to, or when or whether ever it would be paid; and though there might be an account decreed touching the surplus of the late Marquis of *Wharton*'s estate, yet there were several causes in this Court where accounts have been depending, some twenty, some thirty years, or upwards. That were the rule laid down of *id certum est quod certum reddi potest*, allowed to take place in the present case, still things must be reduced to a certainty in the life-time of the husband, who was to make the jointure; for it would be a miserable incumbrance upon the estate of the several remainder-men claiming under the late Chief Justice's [655] will, and in no sort within the intent of the testator, were this power of making a jointure for the widow of *John Holt* to be kept in suspense, and hovering over their estate for the space of twenty or thirty years, and might at last tend to disable these remainder-men from making any jointures, until it should be ascertained how much in the whole Lady *Jane* would be entitled to, and whether her jointure, when made, (though perhaps to be made twenty years hence) should not over-reach the subsequent jointures to be made by any of them, by reason of Lady *Jane*'s precedent marriage articles; which might be a great inconvenience, and hinder the marriages of the remainder-men. That the intention of giving the power to the tenant for life to make a jointure, was, in order to a recompense for the portion which the wife should bring to her husband, not for what might not be brought until about twenty or thirty years after his death, and which consequently could be of no manner of avail as to him, but only to some remote or distant administrator, who might not be so much as known to him. That this additional jointure which was now desired to be made upon Lady *Jane*, was plainly not within the intention of the power, since by virtue of the will it was to be made by the *husband*, which could not be in the present case, he being dead; also the jointure to be made pursuant to the will was to take effect for the benefit of the wife upon the *death of the husband*, which was impossible to be done here, the husband having been already dead above the space of three years: that suppose *John Holt* had by *express* words covenanted,

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that in consideration of what farther monies Lady *Jane* should bring to him in respect of the residue of her portion, &c. *Rowland Holt* the remainder-man should make a jointure to her after the rate of 100*l.* per annum for every 1000*l.* this would
[656] certainly be void, as there could be no pretence that *John Holt*, by any express words or covenant, could bind the remainder-man who did not claim under him, and surely there was as little reason why he should by any *implied* words in the covenant be construed to bind him. Or suppose Lady *Jane* were entitled to a desperate or doubtful debt of 10,000*l.* it would hardly be said that the assignment of such debt, which might never be received, should be looked upon as a portion of 10,000*l.* in recompence for which *John Holt* should be enabled within this power to settle upon his wife 1000*l.* per annum. Wherefore since the most that Lady *Jane* had as yet brought was but 8000*l.* and 1500*l.*, there was no reason for her to ask a farther or additional jointure, until it should appear she had brought a farther portion; consequently her present bill being too early, ought to be dismissed.

Lord Chancellor: The intention of this power is to enable every tenant for life under the Chief Justice's will, to settle a jointure after the rate of 100*l.* per annum for every 1000*l.* which the wife of such tenant in possession should bring; accordingly Lady *Jane* has had a jointure of 800*l.* per annum for 8000*l.* and 150*l.* per annum for her 1500*l.* which she has brought; and it not appearing that she has brought any farther portion to her late husband, I do not see she can be entitled to any additional jointure. It is not reasonable that the life-estate of *Rowland Holt* the remainder-man, or of any other of the subsequent remainder-men, (who in no sort claim under him) should be bound or affected by *John Holt*'s covenant, for making a jointure, any farther than the original power warrants, which is to settle but 100*l.* per ann. for every 1000*l.* such wife should bring to her husband. The estate of the Chief Justice, so carefully settled, ought not to be incumbered with jointures to take effect upon remote contingencies or possibilities of farther portions coming in, when it does not appear what they are, or when, or whether they
[657] will ever come in. On the other hand, I do not think it reasonable that the creditors of Mr. *Holt* should have any benefit of the residue of Lady *Jane*'s fortune, if ever *that* shall be recovered, in regard she cannot have the recompence in consideration whereof it was agreed by the articles that she should part with it: let her therefore keep such overplus of

her estate to herself, without having any additional jointure out of the Chief Justice's estate (*z*). HOLT *v.* HOLT.

(*z*) *Mitford* v. *Mitford*, 9 Ves. 87.

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CASE 206.

Lord Chancellor KING.

2 Eq. Ca. Ab. 241. pl. 28. Attachment. Every attachment returned, on which an order for a Serjeant at Arms is grounded, must be entered in the Register's office, else irregular.

IN 1716 the plaintiff brought his bill against the defendant as executor of *J. S.* for a legacy of 300*l.* In 1724 he obtained a decree to be paid out of assets, and for the defendant to account for his testator's personal estate. In 1729, on the Master's reporting that the defendant had assets, he was ordered to bring the money reported in his hands into the bank by such a day; for not complying with which, the plaintiff took out process of contempt against the defendant and proceeded to take him up in *Wales* (where he lived) by a Serjeant at Arms; but the process being referred for irregularity, the Master reported it irregular, the return of the two attachments, upon which the † order for a Serjeant at Arms was grounded, not being entered in the Register's office (*y*).

Upon this the plaintiff moved to discharge the Master's report, suggesting that he had done his part, and left the attachments with the agents of the Register in his office, where he had paid the usual fee for entering, but that the Register or his agent had not entered them; all which appearing on examination, the Court ordered the Master to tax the defendant's costs out of purse only, which the plaintiff, who was reported to have been guilty of this irregularity, should pay to the defendant, but that these should be answered over to the plaintiff by the Register.

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Suitor having paid the officer his fee, and the officer having neglected his duty, by which means the process becomes irregular, the suitor is to pay the costs, but he to have them over against the officer; and though the officer in such case die, yet this being a duty and matter of contract, his executor will be liable.

After this, Mr. *Price* the Register died, having left *Elizabeth Maddox* executrix; the costs were taxed at 58*l.* and the matter coming on again on petition, Mr. *Mead* objected, that here being a personal neglect or misbehaviour in the officer, it died with him; that if there should be a decree for costs, and the defendant die before taxation, these would be lost,

† In the principal case the attachments were followed by the usual process, a commission of rebellion; but by the course of the Court, *that* issues only to the sheriff of *Middlesex*.

(*y*) Reg. Lib. A. 1730. fol. 131. *Broomhead* v. *Smith*, 8 Ves. 362.

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which was stronger than the present case, where there was but an interlocutory order; or if the executrix was liable, the plaintiff had his remedy by action at law.

To which I answered, and so it was held, that this was not a bare misbehaviour or neglect in the officer, but the plaintiff having carried the attachments to the office, and paid the fees for entering, the Register by his acceptance of them had promised and agreed, by implication of law, to procure the returns to be entered; wherefore the not doing that which he took money for, and engaged to do, was a breach of his contract, and being a duty, could not die with the person, although nothing had been ascertained in the life-time of the Register; just as if he should have promised to pay so much money as the Master should tax, this would not die with the person; that though costs, if not ascertained on the death of the party, are in some cases (1) lost, yet here with respect to Mr. *Price* they were to be looked upon as a duty, and not as costs only, which this Court would not suffer to be examined by any other court in an action, but determine itself, as in all like cases in a summary way. That the executrix of Mr. *Price* standing in his place, and having assets, she should thereout pay this 58*l.* to the plaintiff. But there being no one in Court to admit assets for her, it was ordered that she should be examined as to her having assets.

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(1) Costs directed to be paid out of a particular fund, though not taxed, shall not be lost by the death of the party entitled to them. *Blower* v. *Morrets*, 3 Atk. 772. *Johnson* v. *Peek*, 2 Vez. 465. *Kemp* v. *Mackrell*, 2 Vez. 579 (*z*).

(*z*) *Jenour* v. *Jenour*, 10 Ves. 572. *Lowten* v. *Mayor of Colchester*, 2 Mer. 116. But costs given generally were held to be lost if not taxed in the life of the party to receive them, *Jupp* v. *Geering*, 5 Madd. 375, though Lord Rosslyn held otherwise in *Morgan* v. *Scudamore*, 2 Ves. jun. 313, 3 Ves. 195.

TERM. S. HILLARII, 1731.

EVELYN *versus* EVELYN & e cont'. CASE 207.

Master of the Rolls, in the Lord Chancellor's absence. Keb. 18.

UPON a bill brought by the plaintiffs the three infant daughters of *George Evelyn* by *Mary* his wife, for raising their portions of 8000*l.* (the eldest of the said daughters being about the age of eight years) the case was thus:

Fitzg. 131. Kel. in Cha. 18. 2 Eq. Ca. Ab. 501. pl. 34. 647. pl. 24, &c. A term of 500 years created to raise portions for daughters in failure of issue male, as soon as conveniently may be after the father's death, but no maintenance nor any express time mentioned when the portions are payable; there are three daughters, and the eldest but eight years old, the father is dead, but the mother who has a jointure on the estate is living; the Court will not raise the portions for daughters so young, out of the reversionary term.

George Evelyn the defendant's father (and grandfather to the plaintiffs) had three sons *John*, *George*, and the defendant *Edward Evelyn*.

George Evelyn the father being tenant for life, remainder to his eldest son *John* in tail male, of part of the premises, on the 20 *October* 1698, together with his eldest son *John*, by deed and recovery settled the manor of *Walkhamstead* alias *Godstone* in *Surrey*, to the use of himself for life, *sans* waste, remainder to his eldest son *John Evelyn* for life, remainder to his first, &c. son in tail male successively, remainder to his second son *George Evelyn* for life, remainder to his first and other sons in tail male successively, remainder to his third son [660] the defendant *Edward Evelyn* in like manner, with trustees to support all these contingent remainders, remainder to the heirs male of the body of *George Evelyn* the father, remainder to him in fee; with a power to *George Evelyn* the father by deed or will, to charge by lease, mortgage or otherwise, the premises to himself limited for life, with raising or paying any sum not exceeding 6000*l.* also with a power to every of his sons, when in possession, by deed attested by three witnesses, to limit, before or after marriage, to the wife of any of the said sons for a jointure, all or any part of the premises, so as such jointure should not exceed 100*l.* per annum for every 1000*l.*

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which such son should have received as the fortune of the wife; with farther power to his said sons respectively, when in possession, by any deed or writing under hand and seal, attested by three credible witnesses, to make any lease or leases for years *sans* waste (but without prejudice to any jointure which should be made by virtue of the said power) for the raising of portions for the daughters of such sons, so as such portions should not exceed that which such son making such leases should have had with his wife, and so as such leases should not take effect, until there should be a failure of issue male of such son so making such lease; with the usual power for *George Evelyn* the father and his said sons respectively, when in possession, to make leases for twenty-one years at the most improved rent.

By other indentures of lease and release dated the 20th and 21st of *October* 1698, *George Evelyn* the father, in consideration that his son *John Evelyn* had joined with his father in the said common recovery and settlement, did settle other lands (viz.)
[661] the manor of *Tandridge*, &c. of which he was seised in fee, to the same uses as the said manor of *Walkhamstead* alias *Godstone* was settled by the former deed, with this difference only, (viz.) that as to the son's power of leasing for raising daughters' portions, these words were added, [so as such lease or leases should cease and determine upon the raising of such portions, and costs and charges for raising the same.]

Upon the 1st of *April* 1699, *George Evelyn* the father, in pursuance of his power, mortgaged part of the said land for 1500*l.* for the term of 1000 years, which mortgage afterwards by mesne assignment became vested in Sir *Thomas Pope Blunt*, with a covenant from *George Evelyn* the son for payment of the mortgage-money, and Sir *Thomas* the mortgagee covenanted to re-assign to *George Evelyn* the son. In *June* 1699 *George Evelyn* the father died. In *October* 1703, *John Evelyn* the eldest son died without issue, upon which *George Evelyn* the second son entered upon the premises comprised in the settlement. *August* 22d 1720, upon the intermarriage of *George Evelyn* the son with the daughter of Mr. *Garth*, whose portion was agreed to be 8000*l.* in consideration of the said then intended marriage and 8000*l.* marriage portion, for settling a suitable jointure on her, making provision for the issue of the marriage, and that 8000*l.* should, on failure of issue male, be secured to the daughters, and reciting the said former settlements, with the power for making a jointure, and raising portions for daughters; the said indenture witnessed, that for

the considerations aforesaid, and in pursuance of the said powers, or any other, *George Evelyn* the son did limit and appoint to, and to the use of the said *Mary* his then intended wife for her life for her jointure, and in bar of dower, divers messuages and lands in *Godstone*, not exceeding the value of 800*l.* per annum; also in pursuance of the power in the said settlements, or any other, the said *George Evelyn* the son, in [662] case of failure of issue male between him and *Mary* his said intended wife, granted and leased to trustees (therein named) all the premises limited to the said *Mary* for her life for her jointure, and all other the manors and lands comprised in the said settlements, to hold to the said trustees for the term of 500 years, to commence and take effect from and after failure of issue male of the body of the said *George Evelyn* the son, upon trust, that if there should be failure of issue male of the body of the said *George Evelyn* the son on the body of the said *Mary*, and if he should have one or more daughters by her, then the trustees of the said 500 years' term should, by and out of the rents, issues and profits of the premises comprised in the said term, or by sale, mortgage or lease thereof, or of any part thereof, or by any other ways or means as to them in their discretion should seem meet, *as soon as conveniently might be* after the decease of the said *George Evelyn* the son (or in his life-time if he should think fit to have the same sooner raised, and so direct) levy and raise the sum of 8000*l.* for the portion or portions of such daughter or daughters to be paid to her or them, and equally divided amongst them, if more than one, share and share alike, with a proviso that the term should not prejudice the jointure, and that immediately after the raising the said 8000*l.* with all costs, &c. the said term should cease.

The marriage took effect; but afterwards in the year 1724 *George Evelyn* died intestate, leaving the defendant *Mary* his widow and only three daughters, who by their mother in the year 1725 brought their bill against *Edward Evelyn* and *James Evelyn* his eldest son (being the next remainder-man in tail) praying a present sale of the 500 years' term to raise the por- [663] tions, the eldest daughter being not above four years old at the time of bringing the bill; and on the other hand the defendant *Edward Evelyn* and his son (the next remainder-man in tail) brought their cross bill against Mrs. *Evelyn* the mother (afterwards married to Governor *Bohun*) being the administratrix of her former husband *George Evelyn*, praying that the personal estate of her late husband should be applied towards

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paying off the mortgage of 1500*l.* and in exoneration of the real estate.

27 May 1728.

These causes coming on at first before the *Master of the Rolls* in the absence of the *Chancellor*, he was pleased to declare, that the powers in the deeds of the 20th and 21st of *October* 1698 were well executed, and directed, that it should be referred to the *Master* to state the value of the real, and also of the personal estate of *George Evelyn* the late husband of *Mary*; whereupon the *Master* stated the real (beyond the jointure) to be 91*l.* per ann. the personal estate to be about 4000*l.* and the debts (besides the mortgage) to be about 200*l.* and afterwards these causes being ordered to be set down for hearing before the *Lord Chancellor* upon the *Master*'s report, and for farther directions, and upon the petition of *Edward Evelyn* and *James Evelyn* his son to his Lordship, alleging that they apprehended themselves aggrieved by such part of his Honour's decree, whereby the powers in the deeds of the 20th and 21st *October* 1698 were declared to be well executed, in regard the petitioners conceived that however the term might be well raised, yet that the said powers touching the trusts were not well declared, nor well executed or warranted by the abovementioned deeds: it was therefore ordered that these causes should be set down to be re-heard touching the matters in the petition mentioned, at the same time that the matter of the *Master*'s report was set down for hearing.

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And now the cause standing for judgment in the paper, the *Lord Chancellor*, assisted by the Lord Chief Justice *Raymond* and *Master of the Rolls*, delivered the resolution of the Court.

Lord Chancellor KING. Lord Chief Justice RAYMOND, Master of the Rolls.

Where the personal estate shall go in ease of the real estate, and where not.

1*st*, As to the question, whether the personal estate of *George Evelyn* the son should be applied to pay off the mortgage made by *George Evelyn* the father, in regard the son covenanted to pay this mortgage-money, whereupon the mortgage was to be re-assigned to him, or as he should direct:

S. Madd. 96.

If one mortgages lands and dies, his personal estate shall go in ease of the real; but if A. seised in fee mortgages his land, leaving B. his son and heir, and B. dies leaving C. his heir, B.'s personal estate shall not be applied to pay this mortgage, because it was not B.'s debt: So though the mortgage being transferred in B.'s time, B. covenants to pay the money, yet the debt not being originally the debt of B. his covenant is only a surety, and the land the original debtor, which C. shall therefore take cum onere.

It was agreed that the personal estate of the son should not be applied to pay off this mortgage made by the father, forasmuch as the charge was made by *George Evelyn* the father in pursuance of his power to charge the premises; and as he had such power, the defendant *Edward* must be contented to take the land *cum onere;* that this being the original debt of *George Evelyn* the father, though his personal estate, if any

such were to be found, would be liable thereto, yet the (*a*) son's personal estate ought not to be charged with the father's debt; and notwithstanding that the son did afterwards, on the assignment to Sir *Thomas Pope Blunt*, covenant to pay the mortgage money, yet since the land was the original debtor, this covenant from the son would be considered only as a surety (1) for the land; that it was not like the case (*b*) of Sir

(*a*) See the case of Cope v. Cope, Salk. 449, 450.

(*b*) 3 Bro. P. C. 1.

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(1) The rules respecting the application of the personal estate in ease of the real, as between *volunteers*, (for which vide *Howell* v. *Price*, ante 1 vol. 294.) as they proceed on the principle, that the primary fund ought, in conscience, to exonerate the auxiliary, consequently can hold only in those cases where the funds *in question* stand in those *relative* situations.—The incumbrance may be in its *nature real*, or may *become so* by the act of the person who has power of charging both funds; or, although the land were *auxiliary* only to the personal estate of the *original contractor*, it yet may become the *primary* fund, as between *it* and the personal estate of *any other* person, who may take the land (either by descent or purchase) *subject* to the charge; in all those cases the personal estate is charged (if at all) only as a *surety* for the land, and shall have the same measure of equity as the *land* is entitled to, when it is pledged as a surety for a *personal* debt.—In *Bagot* v. *Oughton*, ante, 1 vol. 347. land descended to the wife subject to a mortgage made by her father; on an assignment of the mortgage the husband covenanted for payment of the money to the assignee; decreed the husband's personal estate was not liable to exonerate the mortgaged premises, for the debt was *originally the father*'s and *continuing* to be so, the covenant was an *additional* security for the satisfaction only of the lender, and not intended to alter the *nature* of the debt.—In *Countess of Coventry* v. *Earl of Coventry*, 9 Mod. 12. and ante, 222. although the covenantor was the *original contractor*, yet the charge being in its *nature real*, and the covenant only an *additional* security, the land was decreed to bear its burthen.—So, *Edwards* v. *Freeman*, ante, 435.—In *Leman* v. *Newnham*, 1 Vez. 51. the son, tenant in fee, on an assignment of the *ancestor*'s mortgage, covenanted with the assignee for payment; yet determined, that the personal security was only *auxiliary*, and both principal *and interest* were charged *primarily* on the land, for although the interest had accrued during the possession of the son, the *interest* must *follow* the principal, and be a charge on the same fund.—So, *Lacam* v. *Mertins*, 1 Vez. 312.—In *Robinson* v. *Gee*, 1 Vez. 251. the same principles are laid down.—In *Parsons* v. *Freeman* before Lord *Hardwicke*, 25th *October* 1751 (*z*). *A.* purchased an estate for 90*l.* which was at that time mortgaged for 86*l.* and he covenanted to pay 86*l.* to the mortgagee and 4*l.* to the vendor. The Court admitted the rules of law abovementioned, but in that particular case thought that, although the covenant was with the vendor *only*, and the vendee's personal estate therefore not liable in that respect to the *mortgagee*, yet the words were sufficiently strong to shew an intention in the vendee to make it *his personal* debt. Reg. Lib. B. 1751. fol. 238.—In *Lewis* v. *Nangle*, 7th *Nov.* 1752 (*y*), before Lord *Hardwicke*, Mrs. *Nangle* was before her marriage with the defendant indebted to sundry persons, and entitled to the inheritance of lands charged with the payment of sundry sums, and before her marriage entered into articles, whereby the premises were to be settled to the husband for life, *sans waste*, remainder in

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(*z*) Amb. 115. 3 Atk. 741.

(*y*) Amb. 150, 1 Cox, 240.

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John Napier, where part of the estate of Sir *John* the mortgagor, was after his death settled by a private act of parliament in trustees as a fund to pay all his debts, and Sir *Theo-*

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like manner to the wife, remainder to the issue of the marriage, remainder to the wife in fee; the marriage took effect, and the husband being pressed for payment of the wife's debts and having also occasion for a further sum of money, they borrowed 1300*l.* of the wife's sister (the original plaintiff in the cause), and secured it by a mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money according to the provisoes in the mortgage: subject to this mortgage, the lands were settled to the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. Mrs. *Nangle* died without issue; and the present plaintiff was the devisee of the sister, who brought his bill against Mr. *Nangle* for payment of the mortgage money; but the Lord *Chancellor* held, that although part of the money was raised for the husband's use, yet the mortgage being a *single transaction*, he must suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt; and his Lordship dismissed the bill so far as it sought to compel the defendant *Nangle* to exonerate the land, but directed him to keep down the interest during his life. Reg. Lib. B. 1752, fol. 574.—In *Forrester* v. *Leigh*, 23d and 25th *June* 1753 (*x*). Mr. *Leigh* the testator had purchased several estates subject to mortgages, with regard to one of which he entered into a *covenant* for payment of the mortgage money *for the purpose of indemnifying a trustee*; and as to another, which was a part only of an estate subject to a mortgage, upon splitting the incumbrance both parties covenanted to pay their respective shares and indemnify each other; Lord *Hardwicke* thought these covenants would not have the effect of making the mortgages *personal* debts of the testator, they having been entered into for *particular purposes*, and declared his opinion accordingly in the decree, Reg. Lib. A. 1752. fol. 325.—In *Perkyns* v. *Bayntun*, Sir *W. Osbaldiston* by will of 5th *Feb.* 1739, taking notice that his daughter *Catherine* was deaf and dumb, and that *Jane Bayntun* had taken care of her, devised certain real and personal estate to *Jane Bayntun*, her heirs, executors and administrators in trust by sale or felling timber to pay all his debts, and directed that *Jane Bayntun* should receive the rents and produce of his real and personal estate without account during his daughter's life, she maintaining his daughter; and after the death of his daughter he gave all his real and personal estate whatsoever to *Jane B.* in fee, and appointed her sole executrix. Sir *W. O.* died *March* 1740, and *Jane B.* proved the will. Sir *W. O.* in his life-time mortgaged part of his estate for securing 1500*l.* and interest, which remained a charge at his death. *Jane B.* paid off 500*l.* part of this 1500*l.* and afterwards borrowed a further sum of 2500*l.* on mortgage of the estates, which money was in the mortgage deeds expressly recited to have been borrowed to enable her to discharge Sir *W. O.*'s debts. *Jane B.* afterwards died, and on the disposition made by her, and those claiming under her of the property of Sir *W. O.* this cause was instituted. The cause was first heard before Lord *Bathurst* on 19th *February* 1777, when the Court declared that the sum of 1500*l.* part of the 3500*l.* was not to be considered as a debt of the said *Jane B.* but was to remain a charge on the

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(*x*) Amb. 171.

philus the son and heir of Sir *John* disposing of that fund, was consequently answerable for the debts, having had the benefit of the fund set apart for them, for which reason it was but just

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real estate, and directed an account of her personal estate. By an order made on rehearing on 13th *August* 1781, that part of the decree was reversed, and instead thereof it was declared, that the said sum of 1500*l.* appearing to have been a charge made upon the estate of Sir *W. O.* in his lifetime and remaining such at his death, was to be considered as a *continued lien* thereon; and that the subsequent charge made on the estate by the said *Jane B.* being expressed in the mortgage deed to have been *made for the purpose* aforesaid, the same together with the 1500*l.* amounting in the whole to 3500*l.* was to be considered as remaining a charge on the said estates. Reg. Lib. B. 1776. fol. 265. and 1780. fol. 365.—In *Wilson* v. *Earl of Darlington*, at the Rolls, *Feb.* 1785 (*w*), a real estate charged with a sum of 2000*l.* as a bounty, was holden to be *primarily* liable, though the personal estate was also subjected by the covenant of the donor.—*Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454.—In *Shafto* v. *Shafto*, before Lord *Thurlow*, *February* 1786 (*v*), the case was this. In *March* 1722, *George Delaval* mortgaged lands to *W. C.* to secure payment of 5000*l.* with interest at 5*l.* per cent. and by will of 22d *May* 1723, devised the lands to his nephew *G. Shafto*, in tail male, remainder to the plaintiff in tail male, remainder over, and died in the same month. In 1725, *G. Shafto* suffered a recovery to himself in fee. The mortgagee calling for his money, *W. Gibbons* agreed to advance the 5000*l.* at 4 per cent. on assignment of the mortgage, which was accordingly by indenture of 4th *June* 1725 assigned to him, with proviso for redemption on payment of the principal and interest, at 4 per cent. and *G. Shafto*, for himself, his heirs, executors, and administrators, *covenanted* with *Gibbons*, that he, his heirs, &c. some or one of them, would pay to *Gibbons*, the said principal and interest, in manner therein mentioned. In 1779, *G. Shafto*, agreed to raise the interest to 5 per cent. and by deed *covenanted* with the mortgagees, that the estate should remain a security for the 5000*l.* with interest at 5 per cent. and that he, his executors, &c. would pay such interest for the same. In *Jan.* 1782, *G. Shafto* died, the interest on the mortgage being then in arrear for about ten months. The bill was brought (amongst other things) to have the 5000*l.* and interest paid out of the personal estate of *G. Shafto*, or at least the arrear of interest due at his death, and the additional 1 per cent. charged by the deed of 1779; but the Lord Chancellor was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the *primary* fund. His Lordship also thought that the interest must follow the nature of the principal, and that the contract for the additional interest, *turning upon the same subject*, must be in the nature of a real charge.—So *Earl of Tankerville* v. *Fawcet*, 2 Bro. C. C. 57 (*t*).—In *Basset* v. *Percival*, at the Rolls, 21st *July* 1780 (*s*), *Matthew Deere*, by will of 15th *Jan.* 1746, devised estates to trustees, for a term of 500 years, to raise money for payment of his debts and legacies, in aid of his personal estate; and subject to the term he devised the estates in strict settlement with the ultimate limitation to his own right heirs, and he gave the residue of his personal estate to his executrix *Catherine Power*. The executrix applied the personal estate in payment of some of the debts, and all

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(*w*) 1 Cox, 172.
(*v*) 1 Cox, 207.
(*t*) 1 Cox, 237.
(*s*) 1 Cox, 268.

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that upon his death his personal estate should be answerable for the debts of his father; whereas in the present case here was no fund for payment of debts that came to the son, but the land was the original debtor, and must continue so, there being nothing substituted in its place; that in the common case where a mortgagor covenants to pay and dies, though *quoad* the mortgagee, the land may be looked upon as the security on which he relies, yet if the mortgagor covenants to pay and does receive the money, he is the original debtor, and his personal

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the legacies except a legacy to herself of 1000*l.* and then died; whilst the limitations in strict settlement subsisted, and after the death of *C. Power*, her representative filed a bill to have a debt due to *C. Power*, and her legacy raised; and the only person then entitled under the limitations in strict settlement dying, pending the suit, by which event the ultimate limitation to the testator's right heirs took place, a supplemental bill was filed against *Margery Deere* and *M. D. Percival*, the co-heirs of the testator. To stop this suit, the co-heirs liquidated the demands of the representative of *C. Power* at 2070*l.* and gave their joint and several bond for that sum; this demand was afterwards assigned to *Ann Basset*, who also bought in debts to the amount of 327*0l.* remaining due from the testator *Mathew Deere*, and the co-heirs gave another joint and several bond to *Ann Basset*, for this sum also; so that *Ann Basset*, became the sole creditor on the estate. *Margery Deere* being dead, and a bill being filed by *Ann Basset* for payment of these sums of money, the question was, whether a moiety thereof should be raised *in the first place* out of the personal estate of *Margery Deere*, or out of the real estate: his Honour was of opinion, that the real estate was the original debtor, and ought to bear the burthen.—And again, in *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101. the covenant of indemnity was not sufficient to charge the personal estate.—In *Mattheson* v. *Hardwicke*, at the Rolls, 28 *July* 1789, the testator devised an estate to *A.* and *B.* as tenants in common in fee, charged with the payment of his debts and legacies. *A.* paid off all the debts, and all the legacies, except one of 100*l.* for which he gave the legatee his promissory note, and died before he paid it. As to the debts and legacies actually paid by him, it was admitted on the part of his personal representatives, that being tenant in fee of an estate subject to incumbrances, he must be presumed to have paid off those incumbrances with a view of easing the estate from them altogether; but as to the legacy of 100*l.* the promissory note was said to be only a *collateral* security, and that the devised estate was the *primary* fund for the payment of it; and his Honour was clearly of that opinion.—*Billinghurst* v. *Walker*, 2 Bro. C. C. 604. *Clinton* v. *Hooper*, 3 Bro. C. C. 211. Et vide *Astley* v. *Earl of Tankerville*, 3 Bro. C. C. 545 (*r*). As to the case of the *Earl of Belvidere* v. *Rochfort*, 6 Bro. P. C. 520. vide *Tweddell* v. *Tweddell*, ub. sub.

(*r*) See also *Lawson* v. *Hudson*, 1 Bro. C. C. 58. *Hamilton* v. *Worley*, 4 Bro. C. C. 199, 2 Ves. jun. 62. *Woods* v. *Huntingford*, 3 Ves. 128. *Butler* v. *Butler*, 5 Ves. 534. *Waring* v. *Ward*, 5 Ves. 670, 7 Ves. 332. *E. of Oxford* v. *Lady Rodney*, 14 Ves. 417. *Lechmere* v. *Charlton*, 15 Ves. 193. *Ruscombe* v. *Hare*, 6 Dow, 1. *Scott* v. *Beecher*, 5 Madd. 96. *Noel* v. *Lord Henley*, 7 Price, 241. Dan. 212, 322.

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estate shall go to ease the land in favour of the heir. But here *George Evelyn* the son was not the original debtor, his father was, who actually received the money; that in the case of the Earl and Countess of (*a*) *Coventry*, where *Gilbert* late Earl of *Coventry* on his marriage with the daughter of Sir *Strensham Masters*, (the Earl being but tenant for life with a power to make a jointure of lands not exceeding 500*l.* per annum on any wife he should marry) covenanted in consideration of the intended marriage, that he or his heirs would after the marriage, according to the power given him by his father's will or otherwise, settle lands of 500*l.* per annum on his wife for her jointure; and it being in proof that the late Earl directed his steward to look over his rent-rolls for a fit parcel of the estate to make good the jointure, and afterwards the jointure deed was drawn and ingrossed, but not executed; though this depended only on a covenant, yet the jointure of land being the chief thing in view, the decree was, that the land should be settled, and the covenant not made good out of the personal estate. In like manner, in the case of (*b*) *Freeman* and *Edwards*, though the wife's jointure and the daughter's portion were secured by articles which were never completed by a settlement, however those articles being to settle lands, and the covenantor leaving lands sufficient to answer it, it was decreed that the daughter's portion should be raised out of the lands, and the personal estate of Mr. *Freeman* the covenantor not be applied in exoneration of the land. So that as to that part of the cross bill, which prayed the mortgage-money should be paid out of the personal estate of *George Evelyn* the son, the same was dismissed with costs.

(*a*) Ante 222.

(*b*) Ante 435.

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Portions secured by a trust term out of land payable to daughters, to be raised by rents and profits, and no time limited for payment, shall carry no interest, and be raised only by perception of profits, not by sale or mortgage.

As to the other point (which was the most considerable) it was agreed that this 8000*l.* should be raised out of the rents and profits of the premises comprised in the 500 years' term, and not by any sale or mortgage thereof, and that no more than the sum of 8000*l.* in the whole should be raised, and the profits be accounted for from the death of *George Evelyn* the husband.

The *Master of the Rolls*, who delivered his opinion very fully, said he would consider the nature of such powers in general, the words made use of in the present one, and the precedents in the like cases for securing and raising portions for daughters.

As to the nature of such powers, they were to be taken

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strictly, being to charge, burden and incumber the estate of a third person. *Vide* 6 *Co.* 33. *Fitz-William*'s case, also 2 *Vent.* 350. *Sayl* versus *Freeland;* upon which occasion the Lord Chancellor *Nottingham* makes this distinction: where a man has a power to make leases or any other charge which is to incumber a third person's estate, such powers are to have a
[667] rigid construction; but where it is to dispose of his own estate (as in that case the party who had the power was tenant in tail) the most liberal interpretation is to be made. In 2 *Vern.* 531. 542, (Lady *Charlotte Orby* versus Lord *Mohun*) the point then in question was no more, than tenant for life with power to make leases of lands usually let at the ancient rent; the tenant for life made a general lease to *J. S.* of all his lands usually let, reserving the ancient rent, and though this general lease followed the words of the power, nevertheless since, if good against the remainder-man, it would put a difficulty upon him in his suit for the rent, to set out what was the ancient rent for every particular parcel of land, and might endanger his being frequently nonsuited before he could be able to recover the rent from the lessee, it was adjudged in Chancery, and affirmed in the House of Lords, that such a general lease was not warranted by the power to bind the remainder-man; which shews, that powers binding the interest of persons in remainder ought to be taken strictly; and as powers in settlements to uses are raised by way of use, which at common law were trusts, they were originally cognisable and determinable in courts of equity. In 1 *Levinz*, 239. *Jenkyns* versus *Kemys* (the same case also in *Hardress* 395. & 1 *Chan. Cases* 103.) tenant for life, remainder to his eldest son in tail, with power to charge the land with 2000*l.* they both by lease and release join in a mortgage in fee of the premises to *J. S.* under proviso to be void on payment of the 2000*l.* and interest, with a covenant for farther assurance, but no mention made of the power; decreed by the Lord Keeper *Bridgman*, that this mortgage should not be intended an execution of the power, but only a common mortgage, and so the father and son being both dead, the mortgage was not binding on the issue of the son either in law or equity, consequently the money was lost; from whence it appears that courts of equity are not free in extending powers given to tenant for life, to bind a remainder-man. Indeed in 2 *Vern.* 379. Lady *Clifford* versus Lord *Burlington*, where the Lord *Clifford* by his marriage settlement was made tenant for life, remainder to his first, &c. son in tail, with power for him to

make a jointure not exceeding 1000*l.* per annum, and his Lordship in treating of the marriage covenanted to settle a jointure of 1000*l.* per annum, giving in a particular of lands as of that value, and settling them, but the lands proved to be only 600*l.* per annum, whereupon after Lord *Clifford*'s death, a bill being brought by the jointress against the issue in tail, to have the jointure made up pursuant to the marriage articles, the decree was, that the issue in tail should make up the jointure 1000*l.* per annum, it is true in that case, relief was given to a purchaser against a purchaser; however this is to be looked on as a family case, where it might be thought severe not to make good her jointure to a lady who brought a considerable fortune, and the decree made (probably) on a faint defence; besides it does not appear to have been thought a right decree, or even sufficiently approved of by the reporter himself (*z*); at least it is to be considered, there was a power to make a jointure of 1000*l.* per annum a covenant, and also an intention to execute it; whereas in the present case, what is asked for the daughters seems not warranted by the original power, which cannot be exceeded by the subsequent settlement of the portion; such part therefore of the deed securing the portion as exceeds the original power, is to be looked upon as of no force; the sons of Mr. *Evelyn* the father, who are remainder-men in his settlement, are at least to be regarded as much as an heir at law, from whom nothing shall be taken but by necessary implication; and though *George Evelyn* the son, in the execution of the power, seems not to [669] have regarded the conveniency of the remainder-man, yet the plaintiffs the daughters can ask nothing but what the power in the settlement of *George Evelyn* the father warrants.

There are two ways of raising portions; the 1*st*, by sale or mortgage; the 2*d*, by perception of profits: now where a particular certain time is limited for the payment of the portion, there it carries interest from that time, and may imply a power of (*a*) sale; but here no certain time is limited for payment; which very much influences the present case, and distinguishes it from others. It is not said or implied, that the portions should be paid or raised upon the death of *George Evelyn* the son without issue male; though it is true, the right thereto did then vest in the daughters, viz. a right to the bare sum of

(*a*) See the case of Trafford v. Ashton, vol. 1. 415. and ante 13, the case of Ivy v. Gilbert.

(*z*) But see *Marchioness of Blandford* v. *Duchess of Marlborough*, 2 Atk. 545. Sugden, Powers, 363. (Ed. 1821.)

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8000*l.* to be raised by perception of profits; and as it were unreasonable in itself to raise the portions by a way so destructive to the estate and family, as a sale would be, it must be more particularly hard to do it in the present case, when the daughters, for whom they are to be raised, are of such tender years; and when it moreover appears to have been the plain intention of the maker of the settlement, to preserve the bulk of his estate in his name and family.

Object. The word [portion] always implies a sum in gross, and to be paid all at once.

Resp. If the daughters are sure of their portions, though the same are not to be raised or paid in so beneficial a manner as they would have them, it is however sufficient; the writ *de rationabili parte bonorum* never required that the children's shares should be paid in a gross sum.

[670] It is observable, that the power given or reserved by *Evelyn* the father to charge the land with 6000*l.* is by *lease, mortgage, or otherwise*, without restriction; but when he comes to make a settlement of his fee-simple lands, his son's power of leasing for raising daughters' portions is restrained, *so as such lease or leases shall cease and determine when the money shall be raised.* Now this is the strongest argument imaginable, that *Evelyn* the father did not intend a sale of the premises for the raising of these portions, but only to do it by perception of profits, when even a lease thereof was not to continue after the portions raised; which could not be, if after those sums were raised, and the children paid, the term were still to subsist for the benefit of a purchaser or mortgagee; it is not possible that the term can cease upon raising the portions in any other sense or way, than by raising them out of the growing profits; and then though the execution of the power by *Evelyn* the son, were it defective, would be supplied or helped in equity, yet where it comes to exceed the power, equity will never support such excess. The truth is, there may be some hardship either way, to the daughters of *Evelyn* the son on the one side, and to the remainder-man the brother on the other; but the greater hardship seems likely to fall on the remainder-man, if the estate (being a reversion) should now be sold; whereas if the daughters have their portions of 8000*l.* though not paid in so beneficial a manner as they could wish, it still is a plentiful provision. In the next place, it appears that the power to raise the portions for the daughters of *Evelyn* the son, was so *as the same should not exceed the portion which their father should have with his wife*, which being but 8000*l.* is the same

as if it had been expressed in the power, that the daughters' portions should not exceed that sum; and this shews that interest for the 8000*l.* was not to be raised, for that might double the sum, and eat up all the reversion. And as to this point, what has been cited from the case of *Lord Kilmurry* versus *Dr. Gery*, *Salk.* 538. (*z*) is not applicable, the decree there being grounded on the particular circumstances of the case: the power arose upon a settlement made with the approbation of trustees by a person during his infancy, and confirmed by act of parliament; by the settlement a power was reserved of charging divers of those lands at any time during his life with the sum of 3000*l.* he borrowed this sum of the Doctor, and having executed his power while an infant, died soon after he came of age; the plaintiff his son brought his bill to redeem on payment of the principal sum borrowed; but the Court then decreed a redemption upon the common terms of payment of principal, interest and costs; because here was a power given to him to raise money, and immediately to give security, which was actually done; and although (perhaps) had he been of age at that time, he should have been obliged to keep down the interest during his life, yet being an infant at the time intended for the execution of this power, and therefore not capable of making his person liable to any part of the engagement, the land must, from the necessity of the thing, have stood engaged for interest as well as principal, or it had been impossible for him during his infancy to have raised any money at all, which the nature of the transactions required.

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Lastly, His Honour cited most of the cases that had been adjudged in relation to portions charged on real estates; but took notice, that the following were the principal cases proving that when no time was limited for the payment of portions, and the daughters claiming the same were of tender years, though the right to the portions vested in such infant daughters, yet they were to be raised by rents and profits:

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First, 2 *Vern.* 72. *Earl of Rivers* versus *Earl of Derby*, where on a marriage, lands were limited to the husband for life, remainder to the wife for life, remainder to the first, &c. son in tail male, remainder to *J. S.* in fee; proviso, that if there should be no issue male, and a daughter of the marriage living at the death of the husband, then the trustees should stand seised of the premises, to the intent that such daughter should receive 10,000*l.* out of the rents, revenues and profits

(*z*) See 1 Vez. 306. 3 Atk. 713. *Hearle* v. *Greenbank*.

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thereof, and 100*l.* per annum for maintenance, and this 10,000*l.* to be for her portion, without appointing any time of payment: there was no son, and but one daughter, who having lived to seventeen died unmarried: decreed that the portion of 10,000*l.* did go to her executor, and was to be raised out of the profits by the trustees; so that here was the case of a portion vested, decreed to be paid out of the profits; and, which was likewise a farther answer to the objection, that by the word [portion] was to be meant a sum to be paid in gross.

(*a*) Ante 13.

Secondly, That of (*a*) *Ivy* versus *Gilbert*, decreed by Lord *Macclesfield*, and affirmed by the House of Lords, where a trust term was limited to raise 1500*l.* for daughters' portions by rents, issues and profits, or by leasing for one, two, or three lives at the old rent; and decreed that the directing the portion to be raised in this particular manner, implied a negative, that it should be raised *in no other* manner, and therefore not by mortgage or sale, nor any more money be raised than the 1500*l.* without interest; which was exactly the same with the principal case, an instance of a portion to be raised by perception of profits without interest: and *his Honour* concluded,

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that there was not one single precedent where a sale had been decreed of a trust term for a portion appointed to be raised by rents and profits, and no time limited for payment.

The Lord *Raymond* relied much on the intention of the maker of the settlement, which appeared to be plainly for preserving the estate in the male line of the family, so that there could be no design to extend the power for raising portions for daughters to a sale or mortgage; consequently such power being neither express or implied, nor any time limited for the payment of the portions, it would (he thought) be extreme hard for the Court to decree that which would prove the destruction of the estate, against the intention of the party (1).

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(1) Reg. Lib. A. 1731, fol. 259. From which decree, so far as it related to the raising the daughters' portions, there was an appeal to the House of Lords, but on the 2d *May*, 1733, the parties on both sides came to an agreement, 4 Bro. P. C. 109, which agreement was confirmed by act of parliament. 7 Geo. 2.

TERM. S. TRINITATIS, 1732.

1 Tr Rep. 620.

KING *versus* COTTON.

CASE 208.

THE (*a*) former decree being ordered to be without prejudice to any relief which the then defendant *King* might have, he now preferred his bill against the several younger children of his wife the Lady *Cotton*, by her former husband Sir *Thomas Cotton*, and also against the Lady *Cotton* his wife, to set aside the several settlements made by her before her marriage with the plaintiff, as being made without his privity, and while she appeared the visible owner of the estate, and thereby induced him to marry her; all which settlements were made by his wife in trust for herself until her second marriage, and afterwards for younger children respectively; but it being now proved that these provisions by Lady *Cotton* for her younger children were made before her marriage treaty with the plaintiff *King* was begun, and in a public manner; that she herself desired they might be public; that she made an entertainment for several of her tenants, whereat being present, she acquainted them her younger son *Stephen* was to be their landlord, in case she married again, and if she * married, her second husband should marry her for love; and it appearing that she had reserved to herself out of these voluntary settlements, her original jointure made by Sir *Thomas Cotton*, (being 420*l.* per annum rent-charge;) that she had nine younger children by her former husband Sir *Thomas*, who, at best, were very slenderly provided for; and farther, that the plaintiff Mr. *King*, when he married Lady *Cotton*, was in very mean circumstances, an half-pay lieutenant in *Ireland*, had two sons by a former wife, and that he had a considerable sum of money with Lady *Cotton*, as she had been executrix and residuary legatee of her former husband Sir *Thomas*; so that it was evident there had been no fraud or imposition on the plaintiff Mr. *King*, who did not so much as pretend he could make any settlement or jointure on Lady *Cotton*.

Mos. 259. 2 Eq. Ca. Ab. 131. pl. 4.

(*a*) Vide ante 358.

If a parent makes a voluntary conveyance in trust for his children, and keeps it in his own power, or in the hands of his agent, and it is got from him, this ought not to bind him; but where a feme having issue by her first husband makes a suitable provision for them before a treaty for her second marriage; this is good, and not liable to be avoided by a second husband.

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For these reasons the *Lord Chancellor* dismissed (1) the plaintiff Mr. *King*'s bill, as to that part of it which sought to set aside any of the settlements made by Lady *Cotton* in trust for her younger children; saying it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband, and this being before her treaty of marriage with Mr. *King*, it had been impossible to have asked him to be a party thereto, he not being then thought of; that though an assignment had been made by the Lady *Cotton* only to a friend, and not a child, a mere voluntary gift before the marriage treaty, in a case so circumstanced as this was, might be binding: and as to the *South-sea* stock, though there was no actual assignment by deed, but only a covenant to transfer, yet this was such an assignment as would bind Mr. *King*; for it was not like a bond from Lady *Cotton* to pay money, since here Mr. *King* was to pay none, nor to part with any thing which was his, it was only a provision made
[676] by Lady *Cotton* before her marriage treaty with the plaintiff, that in case of her marriage such a part of her estate, should go to her children, which was but reasonable; and yet, contrary to this provision made for the children, he himself had sold this stock and received the money, besides a farther sum of 1000*l.* *South-sea* stock which Lady *Cotton* had not assigned; that here the younger children had the law on their side, and had recovered damages in an action of covenant, which benefit he could not take from them. *Note:* They recovered not only the value of the stock, but also all the dividends since the second marriage.

In this case one point arose, concerning which the Court gave no opinion; and it was this: Lady *Cotton* a jointress for life of an estate at *Easher* in *Surrey*, demised the same to trustees for ninety-nine years, if she so long lived, in trust for herself during her widowhood, and after her marriage, then in trust for one of her younger sons *John Salisbury Cotton*, and the heirs of his body, and if he died without issue, the remainder in trust for her next younger son the defendant *Lynch Salisbury Cotton*; *John Salisbury Cotton* died without issue and intestate, and the question was, whether the trust of this term should go to his mother as administratrix to him,

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(1) In Hil. 1733; the cause having stood over from time to time, that the parties might accommodate the matters in dispute. Reg. Lib. A. 1733. fol. 121.

subject to the statute of distribution, or to the next son in remainder?

It was insisted for the Lady *Cotton*, that in the limitation of the trust of the term to *John Salisbury Cotton* and the heirs of his body, with remainder over, such remainder over being only of a trust of a term, was void.

On the other side it was contended that the only reason why the trust of a term could not be limited to one and the heirs of his body, with remainder over, was because this would make a perpetuity; but here could be no perpetuity, in regard the whole term was to determine whenever Lady *Cotton* should die, just as if she had made a lease of her jointure lands to a trustee for ninety-nine years, if she so long lived, in trust for *A.* and the heirs of his body; but if *A.* should die without heirs of his body, living Lady *Cotton*, then to *B.* this had been good. *Ideo quære*, though it seems rather to be a good limitation of the trust, and within the reason of the Duke of *Norfolk*'s case, and the several other subsequent resolutions grounded thereupon.

TERM. S. MICHAELIS, 1732.

SIR EDWARD MANSELL, Bart. Plaintiff;
RAWLEIGH MANSELL, Esq. & al', Defendants.

CASE 209.

Lord Chancellor KING, Chief Justice RAYMOND, Lord Chief Baron REYNOLDS.

Ca. temp. Tal. 252.
2 Eq. Ca. Ab. 747. pl. 6. 748. pl. 2.

Trustees for supporting contingent remainders joining to destroy

EDWARD *Vaughan*, Esq. seised in fee of lands in *Carmarthenshire* of 1630*l.* per annum, made his will dated the 30th of *November* 1683, and devised the premises to trustees (Sir *Edward Mansell* and *Arthur Mansell*) and their heirs, to the use of his sister *Dorothy Loyd* widow for her life, remainder to the said trustees and their heirs during the life of *Dorothy*, in trust to preserve contingent remainders, remainder to the use of the first, &c. sons of *Dorothy* in tail male successively, remainder to the use of the testator's cousin *Edward Mansell* in fee; soon after which the testator dying without issue, *Dorothy*

them, guilty of a breach of trust, and no diversity whether the settlement be voluntary, or for a valuable consideration, or by will only.

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Loyd, the devisee for life, enters and intermarries with Sir *Edward Mansell* the plaintiff's father; afterwards Sir *Edward Mansell* and *Dorothy* his wife, together with *Edward Mansell* the remainder-man in fee, join in a feoffment to trustees to the use of Sir *Edward Mansell* the husband of *Dorothy* and
[679] his heirs, and covenant by the same indenture to levy a fine at the next grand sessions to be held for the county of *Carmarthen*, to the same trustees, and to the same uses. The trustees for preserving the contingent remainders in the will, by indentures of lease and release dated the 23d and 24th of *July* 1686, conveyed the premises to Sir *Edward Mansell* the husband of *Dorothy* in fee, she at that time being *ensient* with a son. On the 7th of *August* following, dame *Dorothy* had issue by Sir *Edward Mansell* her husband, a son, the plaintiff (now) Sir *Edward Mansell*, and afterwards several other children; subsequent to which Sir *Edward Mansell* the father made his will, and being seised in fee of divers other lands besides what was the *Vaughan* estate, devised all his lands and tenements in general words to his son the plaintiff for life, remainder to his first, &c. sons in tail male successively, remainder to the second son of Sir *Edward Mansell* by *Dorothy* for life, with remainder to his first, &c. sons in tail male successively, and died leaving several sons. Dame *Dorothy* his wife also died.

The plaintiff the eldest son of the marriage being barred at law of his remainder in tail by the joining of the trustees before his birth, brought his bill to have the benefit of the will of his uncle *Edward Vaughan*, whereby the premises were devised to his mother *Dorothy* for life only, remainder to trustees during her life to preserve contingent remainders, with remainder to her first son the plaintiff in tail; and that the plaintiff might have the benefit of the settlement, and be re-instated in the premises, as if there had been no breach of trust.

This point, (viz.) whether trustees for preserving contingent remainders joining before the birth of a son in destroying them,
[680] were guilty of a breach of trust? being a matter of great consequence, was reserved for the opinion of the Court, who now, with the concurrence of the Lord *Raymond* Chief Justice of *B. R.* and the Lord Chief Baron *Reynolds*, decreed the same to be a breach of trust in them. And herein,

1*st*, It was resolved, that the feoffment and fine by Sir *Edward Mansell* and *Dorothy* his wife *did not* destroy the contingent remainders to the first, &c. sons of *Dorothy*, but

that the right to the freehold in the trustees did support them.

2*dly*, That when the trustees joined in the lease and release to Sir *Edward Mansell* (the plaintiff's father) and his heirs, this *destroyed* the contingent remainders.

3*dly*, That the joining of the trustees to destroy such remainders was a plain breach of trust; and though this had not been before judicially determined, yet it seemed to the Court, in common sense, reason and justice, to be capable of no other construction: for when trustees are appointed to preserve an estate in a family, and for no other purpose, and they, instead of preserving it, do a wilful act with an intent, and in order to destroy it, how can this be otherwise than a plain breach of trust, or how can it be rendered clearer than by barely putting the case? should the Court hold it no breach of trust, or pass it by with impunity, it would be making proclamation, that the trustees in all the great settlements in *England* were at liberty to destroy what they had been intrusted only to preserve. Indeed, where an estate is limited to *A.* for life, remainder to his first, &c. sons in tail, though it be a plain wrong and tort in him to do any act which will destroy those contingent remainders before the birth of a son, notwithstanding his *legal* [681] power of doing so, yet as in this case there is no trustee, there can be no trust, nor consequently any breach of trust, and therefore a court of equity may have no cognizance of such a case, nor handle for relief, the matter being left purely to the common law. But to prevent this inconvenience, has the remedy of appointing trustees been invented, on purpose to disable the tenant for life from doing such injury to his issue, which is not a very old invention. Now as it was a tort in the tenant for life, (where there were no trustees) to destroy contingent remainders, so must it more plainly be one in trustees to join in the destruction of them, being contrary to their trust, upon which account only is such act of theirs punishable in a court of equity.

Then as to the remedy: had the premises been conveyed to one without notice and for a valuable consideration, such purchaser must have held the lands discharged of the trust, and the son of the marriage who was injured by the breach of trust, have taken his remedy against the trustees only, who would have been decreed to purchase lands with their own money, equal in value to the lands sold, and to hold them

If the persons claiming under the breach of trust have notice of it, then they are subject to the same trust; so if the conveyance be voluntary, or without a valuable consideration; but if for a valuable consideration and without notice, the purchaser will hold the land discharged, and the trustees must buy and settle other land to the same uses.

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upon the same trusts and limitations as they held those sold by them. But even in case of a purchase, if the purchaser had notice of the trust which the trustees were subject to, as annexed to their estate, such notice would have made him liable to the same trust; so if there had been a voluntary conveyance made of this estate, though without notice, the voluntary grantee would have stood in the place of the grantors and have been liable to the trust, in the same manner as the trustees themselves were: but in the present case it is much stronger; for here was not only notice of the trust, but the conveyance itself voluntary, and made to Sir *Edward Mansell* the plaintiff's father (who was the tenant for life) and was himself *particeps criminis*, nay one for whose sake and interest all this had been done. So that the lands conveyed by these trustees must now remain liable to the same trusts, as they were when the trustees joined in the conveyance to Sir *Edward Mansell*.

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As to what has been mentioned from *Pollexfen*'s *Rep.* 250. "that trustees were never punished in equity when they broke "their trusts," that was said by Mr. *Pollexfen* when of counsel, *& arguendo* only; and it is observable, that still this saying admits it to be a breach of trust, which of course seems punishable in a court of equity. However, to outweigh this, there is the case of (*a*) *Pye* and *Gorge* reported in *Salk.* 680. which is of greater authority than the *dictum* of *Pollexfen* as counsel; it being there declared by Lord *Harcourt* (though not decreed, as the book says) that trustees for preserving contingent remainders are punishable as for a breach of trust, if they join in a conveyance to destroy them: and for *Englefield*'s case in 1 *Vern.* 443. 446, where there was a destruction of a contingent remainder, that was determined only upon the fraud appearing therein; besides, there being no trustees, there could be no trust, nor consequently any breach thereof.

(*a*) Vol. 1. 128.

It has been contended, that though in all settlements on marriage, or for other valuable consideration, it would be a breach of trust in the trustees to join in the destroying contingent remainders, yet it is otherwise in case of remainders created by a will, or other voluntary settlement; but in reality it is as much a breach of trust in one case as in the other; it cannot be denied, but that if I make a voluntary conveyance in trust for myself, and my trustees sell the estate, or convey it to another for any valuable consideration, without notice, I have, notwithstanding, a remedy against them for this breach of

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trust; and whether they do it by a voluntary conveyance, or not, is not material, for still every trustee ought to be faithful to his trust. With regard to the case of *Ely* [or *Else*] versus *Osborn*, 2 *Vern.* 754. where the marriage settlement was to the use of the husband for ninety-nine years, if he so long lived, remainder to trustees during the life of the husband to preserve contingent remainders, remainder to the wife for her jointure, remainder to the heirs of the body of the husband by the wife, remainder to the right heirs of the husband; which settlement was made by the husband, and he having two sons, joined with his wife, his eldest son, and the trustees, in a fine, upon which it being objected that this was a breach of trust in the trustees, the Court is said to have held it was not; for that the first son was in equity as tenant in tail, and he having joined with the trustees, made it no breach of trust: the (*a*) report of this case is not satisfactory; it cannot be said that the eldest son, where the remainder is limited to the heirs of the body of the husband by the wife, can, during the life of the husband, have any estate vested in him in equity, more than he has at law, [for *nemo est hæres viventis* †;] and as to that of (*b*) *Winnington* versus *Foley*, where lands were settled on marriage to the husband for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to the first, &c. sons of the marriage in tail male successively, remainder to the first, &c. sons by any other marriage in tail male; the husband had a son, the wife died, and the son being about an advantageous match, the surviving trustee apprehending himself to be a trustee for all the sons, would not join in a recovery without a decree, which was accordingly had, directing him to join therein; one reason of that decree was, for that this, by making the son tenant for life instead of tenant in tail, would be a means of preserving the estate the longer in the family; but Lord *Macclesfield* (then Chancellor) moreover observed, that the wife of Mr. *Winnington* the father being dead, there could be no more contingent remainders within the consideration of the marriage settlement, and therefore it was reasonable to decree the trustee to join. But in the present case there are none of these circumstances, no decree for the trustees to join, could possibly have been obtained here (1).

(*a*) See vol. 1. 387. where this case is reported differently.

(*b*) Vol. 1. 536.

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† *Note;* This particular case was observed only by Lord *Raymond.*

(1) On this subject vide *Basset* v. *Clapham*, ante, 1 vol. 358.—In *Barnard* v. *Large*, before Sir *Thomas Sewell*, Master of the Rolls, *July* the 3d

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With regard to the case of *Pye* and *Gorge*, (mentioned above) where a third person settled lands on the husband for ninety-nine years if he should so long live, remainder to trustees and their heirs during the life of the husband, to support contingent remainders, remainder to the first, &c. son of the husband by the marriage, remainder to the right heirs of the husband; the husband, wife, and trustees joined in a sale of the premises; after which the husband and wife dying without ever having had issue, a remote heir brought his bill to be relieved against this conveyance as a breach of trust, which bill was dismissed, for that such remote heir was not intended to be provided for by that settlement; to bring that determination to this case, it must be supposed, that if a son had afterwards been born, the *Lord Chancellor* would not have declared it a breach of trust; whereas his Lordship did here actually declare it to be a dangerous experiment for trustees *in any case* to destroy remainders which they were appointed by the settlement to preserve.

1781 (*z*). *Francis Barnard*, by will devised freehold and copyhold estates to *T. C. Barnard* for 99 years, if he should so long live, remainder to the defendant *Large* during the life of *T. C. Barnard*, in trust to preserve contingent remainders, remainder to the first and other sons of *T. C. Barnard* in tail male, remainder to *J. Wall* in fee. —*T. C. Barnard* had issue only one son, who had attained 21 years of age, and the father and son now filed a bill against *Large* the trustee, and *Wall* the remainder-man, stating that they were desirous of suffering a recovery and limiting the estate so as to preserve the contingent remainders to the second and other sons of *T. C. Barnard*, and praying that *Large* the trustee might be decreed to join in making a tenant to the præcipe for that purpose, submitting to declare the uses of the recovery to the second and other sons of *T. C. Barnard*, by way of contingent remainders as limited by the will, and to limit an estate to a trustee for the purpose of supporting and preserving those contingent remainders—His Honour observed, that with respect to remainders to remote relations in *settlements*, where the persons to whom they were limited were not the immediate objects of the parties or where they stand in opposition to the first tenant in tail desiring a reasonable benefit, consistent with the intentions of the creator of the limitations, their pretensions have not been much considered—but in the principal case all took as volunteers, and were all equally to be attended to.—His Honour then considered the several cases on this subject, and said that from a view of them all it seemed, that when the eldest son tenant in tail is of age and about to marry, and thereby *continue*, instead of *destroying*, the purposes of the settlement, and in some cases where there has been particular distress under particular circumstances, which ought to have induced the trustee to join, the Court has interfered; otherwise, not: that in the principal case, he was called upon to disturb the testator's disposition merely for the sake of disturbing it, for which he saw no reason, and dismissed the bill with costs.

(*z*) Amb. 774. 1 Bro. C. C. 534.

The case of *Plat* versus *Sprigg*, 2 *Vern.* 303. where a man having mortgaged and incumbered his estate, settled it on himself for life, remainder to trustees during his life, to preserve contingent remainders, remainder to his wife for life, remainder to their first, &c. son in tail; the husband having no issue articled to sell to one, who brought his bill for a specific execution of the articles, and to compel the trustees to join in conveyances; and it appearing that the mortgagee threatened to enter, and foreclose, and the wife of the vendor consenting in Court to a sale, the trustees thereupon were decreed to join: now it is to be observed, *First*, that there did not appear in this case ever to have been issue. *Secondly*, That the mortgagee might have swallowed up all by his mortgage. And, *Thirdly*, that (as was done in the case of *Winnington* versus *Foley*) the trustees were *decreed to join;* whereas no such circumstances are found in the present case: besides where the husband and wife were much in years, had no prospect of issue, and the estate in debt, the Courts may perhaps have formerly gone so far as to decree trustees to join in a sale, which however was *going too far;* but the principal case appears with a quite different aspect, the married couple young, the wife *ensient* when the trustees joined to bar the remainders, and the conveyance by the trustees made on purpose to bar this child then so near its birth: so that were there no precedent for relief, yet the reason and justice of the case is so strong, that unless precedents could be produced in the very point against it, the act of the trustees ought to be deemed a breach of trust, and punished as such; and therefore the land in the hands of the voluntary grantee must be affected with, and liable to, the trust. [685]

Let all parties join in making such an estate to the plaintiff, as he would have been entitled to under Mr. *Vaughan*'s will, if these contingent remainders had not been destroyed, that is, an estate in tail male, &c. (1).

(1) Reg. Lib. B. 1732. fol. 76.

CASE 210. EDWARD STANLEY, Plaintiff;

SIR JOHN LEIGH, Administrator of Francis Leigh, by Bill of Revivor, and CHRISTOPHER HUSSEY, } Defendants.

Argument of Sir JOSEPH JEKYLL, Master of the Rolls.

2 Eq. Ca. Ab. 293. pl. 20. One possessed of a term devises it to A. for life, remainder to his first, &c. son in tail successively, remainder to his daughter, and if A. shall have neither son nor daughter, then to J. S. A. dies having never had a son or daughter; the devise over to J. S. is good.

(qs). 2. Ch. 364.

THE case is this: *Dorothy Lennard* possessed of lands in *Surrey* for the residue of a term of 500 years, on the 29th of *July* 1729 made her will, and devised these lands to the defendant *Hussey* for the remainder of the term, in trust to raise money by sale or mortgage to discharge her debts and legacies, and after payment thereof, to permit her nephew *Francis Leigh* and his assigns to receive all the rents and profits of the premises (deducting an annuity of 100*l.* per annum given to her mother) for so long of the said term as he should happen to live, and after his decease to the use of the first son of *Francis Leigh*, and the heirs male of the body of such first son, and in default thereof, to the second and other sons of *Francis Leigh* severally, and respectively in order and course as they should be in seniority of age, and priority of birth, and the several heirs male of the respective bodies of such son and sons; and in default of such issue, to the use of the daughter and daughters of *Francis Leigh*, and if more than one, to be divided amongst them share and share alike at their ages of twenty-one or marriage; and in default of daughters, or in case of their death before their age of twenty-one or marriage, then to the use and behoof of the plaintiff for the then residue of the term. The testatrix gave her mother an annuity of 100*l.* per annum for her life, and to the plaintiff [687] 200*l.* besides several other legacies, making *Francis Leigh* executor.

The 10th *November* 1729, the testatrix died, and the defendant *Hussey* declining to act, *Francis Leigh* entered on the leasehold premises, and possessed other parts of the personal estate. The testatrix being indebted to the plaintiff in 500*l.* on bond, he brought his bill for an account of the personal estate, and for a satisfaction of his debt and legacy; and after satisfaction of all the debts and legacies, that such surplus of the leasehold estate as should not be sold for that purpose, might be settled according to the will, insisting that the limitation to him of the leasehold estate was a good limitation.

Francis Leigh by his answer insisted that the limitation of the leasehold estate to the plaintiff was void, and that if the

said *Francis Leigh* should die without issue, it would go to his executors.

Upon the first hearing of this cause, 1*st December* 1731, the usual directions were given for taking an account of the testatrix's estate, and of her debts and legacies, for sale of so much of the leasehold estate as should be necessary for the payment of such debts and legacies; and the consideration how the surplus of the leasehold estate should go after the death of *Francis Leigh* without issue, was reserved till after that contingency happened.

The contingency has since happened by the death of *Francis Leigh* without having had any issue, and the cause has been revived against the now defendant Sir *John Leigh* his administrator; and being brought again to hearing for directions as to the point reserved by the former decree, the question is, whether the limitation of the trust of the leasehold estate to the plaintiff by the will of *Dorothy Lennard* be a good, or void limitation?

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I am of opinion it is a good limitation, and that the trustee the defendant *Hussey* ought to assign the residue of the term to the plaintiff.

To make this limitation void it must be asserted, that it tends to a perpetuity: now in order to examine this assertion, let us see what is a perpetuity. A perpetuity, as it is a legal word or term of art, is the limiting an estate either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after. I have joined estates of inheritance and for years together, because the law does equally abhor what is called a perpetuity in the one as in the other; the reason of which abhorrence is, the mischief that would arise to the public from estates remaining for ever, or for a long time unalienable or untransferrable from one hand to another, being a damp to industry, and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered: now this inconvenience and mischief are the same, let the right or interest in the estate to be limited be what it will. Had this been constantly attended to, there would not have been such a distinction in the doctrine of perpetuities between the limitation of a fee-simple estate, and that of a term for years, as hath sometimes been made. If any distinction was to be allowed, I should have thought the law would rather or with more strictness, have guarded against perpetuities in fee-simple estates,

Definition of perpetuity.

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than in terms, since there might be an indefinite perpetuity in an inheritance; but there can be no such thing in a term, the expiration thereof putting an end to all limitations whatsoever carved out of it.

But the blending the old notion of the infirmity or meanness of an estate for years (by the common law always in the power of the freeholder) with the notion of a perpetuity, things distinct in their nature, (I conceive) begot confused ideas, and it was thought a man might not have so much power over a term for years, as over a fee-simple estate. This distinction is exploded in very strong terms by the Lord *Nottingham*, in Duke of *Norfolk*'s case (*a*), where he calls it, "a distinction "*in words*, and says, there is no real difference but what man-"kind will laugh at; shall not a man, saith he, have as much "power over his lease as over his inheritance? This were an "absurdity altogether insuperable." Now it cannot be pretended but that the same limitations as are in the present case, which is of a term, would have been good if they had been of an inheritance, and yet that would have gone a little farther towards a perpetuity; for the sons, though not *in esse*, must all have taken one after another, and none of them could have barred the remainders but by a recovery, which requires time, and cannot be done in an instant; whereas in this case, the first son would, upon his birth, have had the whole residue of the term subject to the precedent interest vested in him, and it could never have gone over to any in remainder, if he had died before his age of twenty-one, but his executors or administrators would have had it, who would have aliened or assigned it instantly. If he had lived till twenty-one, so might he have done. This is therefore farther from a perpetuity than if the like limitations had been of a fee-simple estate.

(*a*) See the end of Chan. Ca. and there p. 32.

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The common course of settling terms for years.

Again, let us see what is the common course of settling terms for years, to which great regard is to be had, and of which having informed myself, I find it usual in marriage settlements to limit them thus: to trustees for the whole term, in trust to permit the husband and wife and the survivor, to receive the rents and profits during so long of the term as they shall live, and after the death of the survivor to permit the first son of the marriage to receive the rents and profits till he attains twenty-one, and if he attains that age, then the trustees to assign the residue of the term to him; but if such first son dies under twenty-one, then in trust for the second and other sons in like manner, and if no sons, then in trust for the daugh-

ters, or any other person as shall be agreed between the parties. This too is apparently going farther towards a perpetuity than the present devise.

But it is objected, that the devisor, by the limitations over in default of heirs male of the first son, *intended* a perpetuity, and such intention of his shall make the farther limitations void. Now supposing the devisor did intend a perpetuity, it would be very strange, if for that reason only, the law should make those limitations void; for if they do not really tend to a perpetuity, the bounds which the law has set to extraordinary devises or limitations of terms for years, are not transgressed, nor are its rules violated; so that the intention is vain and fruitless, and consequently can or ought to have no operation at all. But I think it cannot be affirmed, that the devisor in the present case had any such intention: if he knew the law, he could not intend it: he takes notice that his only interest was a term, and the limitation of the trust of that term to the first son of *F. Leigh*, and the heirs male of such first son in [691] contingency (if the contingency happened, and there was a son) would absolutely have given his son the whole residue of the term, subject to the precedent limitations; for the words *to the first son and the heirs male of his body*, do not operate as a limitation of the time or duration of the estate, but as an absolute disposition of the term, agreeable to what the Lord *Nottingham* says in the Duke of *Norfolk*'s case, *p.* 34. and though in wills the law presumes a man to be *inops concilii*, and will effectuate his intention, in limiting an estate where he has expressed himself improperly; yet will he not be presumed to be ignorant of the legal operation of words made use of in one of the limitations, in order to defeat the other; this would be raising a presumption to a quite contrary purpose from what the law intends.

Another objection to the plaintiff's title is, that the limitation to him is postponed to the sons of *F. L.* and to the daughters arriving to twenty-one or marriage; and (say they) there might have been a posthumous son, and if no son, a posthumous daughter, or one who might not live to twenty-one or marriage, and so the contingency, on which the limitation to the plaintiff was to take effect, might not happen within the compass of a life.

As to the case of a posthumous child, that is a contingency which must happen within a short time after the death of the father; and this objection was taken notice of and disallowed by the Lord *Cowper* in *Higgins* and *Dowler*, which I shall

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have occasion to mention more largely by and by; besides, a longer time, a year beyond a life, was allowed in the case of *Lloyd* and *Carew*, adjudged in the House of Lords, *Shower's Cases in Parliament*, 137. As to a daughter's arriving at

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twenty-one or marriage, that is a contingency which must happen within a reasonable time after the death of the father, and indeed prevent the power of alienation no longer than the law would do if there were no such contingency expressed, as it (*a*) has been held in this Court. This objection therefore, that the contingency on which the plaintiff's title is to depend, might not happen strictly within the compass of a life, is of no weight.

(*a*) See the case of Maddox versus Staines, ante 421.

Let us now see what authorities there are on one side or the other to guide us in the present case: all those then adjudged which any ways concern the present question, were taken notice of and thoroughly canvassed in the Duke of *Norfolk*'s case; I shall mention but few of them, and refer to the book for the rest.

I observe, that though the case of *Child* and *Baily*, which may be urged as an authority for the defendant, is not only denied to be law by the Lord *Nottingham* in the Duke of *Norfolk*'s case, but also by the Court of King's Bench, *Mich.* 5 *W. & M. Lamb* and *Archer*, *Salk.* 225; yet there are two others which the Lord *Nottingham* admits, and goes so far as to call plain and clear, and they are these: if a term be limited to a man for life, and after to his first and other sons in tail successively, and for default of such issue, the remainder over, such remainder is void, though there never were a son born, for that looks like a perpetuity, Sir *William Backhurst*'s case: yet one step farther, (says he) and that is (*b*) *Burgiss*'s case, where a term being limited to one for life, with contingent remainders to his sons in tail, with remainder over to his daughters; though he had no son, yet because it was foreign and distant to expect a remainder after the death of a son to be born without issue, that having a prospect of a perpetuity, was also adjudged to be void.

See his argument, p. 29.

(*b*) 1 Mod. 115.

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I must observe as to the first of these cases, which is that of *Backhurst* (*c*) versus *Bellingham*, reported in *Poll.* 33. the remainder of the term held to be void was after limitations to a great many persons, and to their first and other sons respectively, and the heirs male of their respective bodies; nor does it appear by *Pollexfen*'s report, but that some of those contingent limitations to the first and other sons had vested, or if they had not, still that particular is not taken notice of; the

(*c*) or Backhouse.

second indeed, (viz.) that of *Burgiss* and *Burgiss*, reported in 1 *Mod.* 115. 1 *Chan. Ca.* 229. and *Poll.* 40. is a full authority for the defendant in this case; but then it is to be considered, that this was a decree of Lord *Nottingham*'s own, and at the time when the principle laid down by him afterwards in the Duke of *Norfolk*'s case, of a man's having as much power over a term as over an inheritance, had not obtained, nor is it very probable that it did occur to him; besides, it is easy to imagine he would make large concessions, in order to lessen the number of the resolutions which he was to encounter in the Duke of *Norfolk*'s case: these concessions too were made in the first argument; and any one that reads his second argument, will find that he grows stronger in his opinion upon that point, of a man's having as much power over a term as over an inheritance. After all, these concessions or resolutions must be tried by the reason given for them, which is singly in the first case, that such limitations look like, and in the second, that they have the prospect of, a perpetuity; now it is very strange, that the limitation a man makes of his estate should be void, because it *looks like* a perpetuity, when surely the law must be formed on *realities*, and not upon the *looks* or *appearances* of things; it is equally strange, that such a limitation should have a *prospect* of a perpetuity, which it is impossible should ever terminate in a perpetuity; this I think is sufficient to invalidate the authority of [694] those resolutions, especially when they run counter to the whole tenor of the Lord *Nottingham*'s reasoning in the Duke of *Norfolk*'s case, and several other resolutions there cited, particularly *Wood* and *Saunders* case much relied on by him, which I shall mention by and by, and also to a resolution in point in the case of *Higgins* and *Dowler*, reported in *Salk.* 156. 2 *Vern.* 600. but of which I have a farther manuscript report. Now it is observable with regard to this last case, that though the two printed books differ in wording the limitations, yet they agree in the point resolved by the Lord *Cowper*, and the only one argued before him, which was, that the limitations of the trust of a term by a marriage settlement to the father for life, remainder to the first and other sons and the heirs of their bodies respectively, remainder to the daughters, were good, and there happening to be no son, the limitation to the daughters would take effect.

This was upon a demurrer to a bill brought in dis-affirmance of the daughter's title, who was the only issue of the marriage; none of the reports say what became of it, but all

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agree the point was so resolved; and by some notes taken by Mr. *Goldsborough* the Register then in Court, of which I have a copy, it appears to have been really so; these say, that Lord *Cowper*, on arguing the demurrer, declared the reason why a remainder after an estate-tail of a term is accounted void, to be, because an estate is vested; but at the same time declared, that if the contingency did not happen, so as the estate did never vest, the remainder was good; yet he over-ruled the demurrer, and directed, that when the cause came on upon the merits, precedents should be produced. By this it appears, that the opinion of the Court was according to the reports,

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and that over-ruling the demurrer was only in order to a more solemn determination of the cause, and not from any doubt in the Court, for the manuscript report which I have says, *Lord Chancellor* took it *with* (*a*) *great clearness*, that where the limitation ever vested in the son, the remainder to the daughter is void, but if there never was a son, such limitation is good. As to what is said at the end of the case in *Salk.* that upon reading the settlement it appeared to be, " that in " default of issue male of the body of the husband (that is " the father) then to the daughters," for which reason the limitation to the daughters was held to be void; that could be no ingredient in the judgment of the Court; for on arguing a demurrer, the Court cannot go out of the pleadings; this must therefore be a mistake, and I suppose the bill was read, and not the deed.

(*a*) Vide vol. 1. 99.

The bill to which the demurrer was put in was an amended bill, and was thus, as I have it from the record:

The plaintiffs were executors of *Alice Higgins*, and administrators of *Henry Higgins* her son, and brought their bill against the trustees of the term, and the administrator of *Mary* the wife, and *Elizabeth* the daughter of *Henry Higgins*, upon this case: *Alice Higgins*, as administratrix of her husband *Henry Higgins* senior, being possessed of a term of 999 years, in consideration of an intended marriage between her son *Henry* and *Mary Dowler*, demised the premises to the defendants *Lowe* and *Dowler* for 860 years, in trust for herself for life, remainder to *Henry* for life, remainder to *Mary* the intended wife of *Henry* for life, remainder to the eldest son of the said *Henry Higgins* on the body of the said *Mary* to be begotten, his executors and administrators, who should re-

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ceive and take the rents issues and profits of the premises to his and their own use during the then residue of the said term; and for default of issue of the first son, then that all

and every the sons of *Henry* begotten on the body of *Mary*, their executors and administrators, and every of them, as they should be in seniority of age, should receive and take the rents issues and profits of the premises to their own use during the term; and for default of issue male of *Henry* to be begotten on the body of *Mary*, then that the daughters of *Henry* begotten on the body of *Mary* should receive and take the rents issues and profits of the premises for the residue of the term, equally to be divided between them; and in case *Henry* should have no issue on the body of *Mary*, then the rents issues and profits of the premises should be enjoyed by the executors administrators and assigns of *Henry*. The marriage took effect, and there was issue of such marriage only a daughter *Elizabeth*, who survived her father, and died intestate in the life-time of *Mary* her mother; *Alice* afterwards died, and made the plaintiffs executors of her will, and the plaintiffs had then got administration to *Henry;* after the death of *Alice*, *Mary* the mother enjoyed the premises many years, and dying intestate, her brother the defendant *Dowler* was her administrator.

The plaintiffs by their bill insisted, that the limitation to the daughters, which was to arise in default of issue male of the marriage, and much more the other subsequent one to arise in default of daughters, were void both in law and equity, and that they neither did nor could subsist, but that upon the death of *Henry Higgins* and *Mary* his wife, without any son or sons, the leasehold estate did result back to the executors of *Alice Higgins*, from whom the term came; therefore the bill prayed, that the defendants might assign the premises to [697] the plaintiffs, deliver up the writings, and account for the profits. On this title solely it was that the plaintiffs relied, and it is observable, that the bill dis-affirms any title in the plaintiffs as representatives of *Henry*, by insisting that all the limitations which were to arise in default of issue of the first son were void, and consequently that the implied limitation to *Henry* and his issue on the body of *Mary* was void, as well as those to the other sons and daughters: this was the case on which the demurrer was argued, and over-ruled in the manner I have now mentioned. The defendants afterwards put in an answer, by which it appears, that the defendant *Dowler* was administrator to *Elizabeth* the daughter, and that the administration to *Henry*, which had been granted to the plaintiffs, was repealed, and granted to the defendant *Dowler*. With only this variation, the cause came on to be heard the 30th of *May*

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1708, and, as appears by the Register's book, the Court then declared, that as the plaintiffs claimed the residue of the term only by way of a resulting trust, the limitation to *Henry*, his executors administrators and assigns, was a sufficient disposition to prevent a resulting trust for the benefit of *Alice*, and therefore dismissed the bill.

Upon this state of the case these observations arise,

1*st*, That upon the frame of the bill the point reported, (viz.) whether the limitation to the daughter was a good limitation, came properly in question. 2*dly*, That the plaintiffs did not rely on their title as representatives of *Henry*, for they had disaffirmed it by their bill, and had reason to do so, for though they got administration to *Henry*, they could not hold it, but it was repealed, and granted to the defendant *Dowler*. 3*dly*, That the point determined at the hearing was consistent with
[698] the opinion of the Court on arguing the demurrer, for it adjudged the limitation to the executors administrators and assigns of *Henry*, a sufficient disposition to prevent a resulting trust, which could not be, if the limitation to the daughters, and all those to arise on default of issue of the first son, as the plaintiff insisted, were void.

This is therefore a full authority for the plaintiff in the present case, and so I think is the case of *Wood* and *Saunders*, *Poll.* 35. and cited (but shortly) by Lord *Nottingham* in the Duke of *Norfolk*'s case, *fo.* 37. where the trust of a long term is limited thus: to the father for sixty years, if he live so long, then to the mother for sixty years, if she live so long, then to trustees to assign to *John* the son, in case he survived his father and mother, for the residue of the term, but if he died before assignment, and left a son, then to assign the whole term to his eldest son, and if no son, then to his daughter if any; and if *John* died without issue before assignment, or having issue, his issue died before assignment, then in trust for *Edward* the son and the heirs of his body. *John* died without issue in the life-time of his father, and then the father and mother died, *Edward* the son surviving; the question was, whether the limitation to *Edward* was good; and *Edward* dying, whether his administrator was entitled or not? The Lord Keeper *Bridgman*, assisted by Mr. Justice *Twisden*, Mr. Justice *Rainsford*, and Mr. Justice *Wild*, agreed in opinion, and declared, that the estate limited to *John* being but in nature of a contingency, nothing ever vested in him, and that *Wood* and his wife, as administratrix of *Edward* the son, were well entitled to the trust of the term, and decreed accordingly.

Here were limitations very near to the present case, and the directions to trustees to assign the whole term to the eldest son make no difference; for so the trustees in the present case must have done as I have shewn before, if there had been an eldest or any son born. But farther, in the case cited there was a double contingency precedent to the vesting the whole trust of the term, (viz.) not only *John*'s dying without issue before assignment, but if he had issue, the dying of such issue before assignment; if he had issue a son, that son would not have taken at his birth, as the son of *Francis Leigh* would have done in the present case; but if he had died before he had or could have taken any assignment of the term, and the father had died without any other issue, the trust of the term would have gone to *Edward:* besides, there is a dying without issue of *John* precedent to *Edward*'s taking, which perhaps might take in grandchildren as well as a son or daughter. This case was therefore stronger against *Edward*'s taking, than the present against the plaintiffs; but these contingencies being of necessity to happen within the compass of two lives, and no contingent estate ever vesting, this solemn resolution held the limitation to *Edward* to be a good limitation.

Upon the whole matter, if I should dismiss the plaintiff's bill as to the point in question, it must be solely upon the authority of the two cases, *Backhouse* versus *Bellingham*, and *Burgiss* versus *Burgiss*, supported by no solid reasons, contradicted by other authorities, and contravened by the common course of settlements of terms for years, which I ought not to overthrow, or any way weaken.

I must therefore remain of the same opinion I was, to (1) decree for the plaintiff, that the trustee *Christopher Hussey* do convey the residue of the term unsold to him. †

† See the case of *Sabberton* versus *Sabberton*, Mich. 1736, where on a like limitation over of a personal estate, a case was made by Lord *Talbot* for the opinion of the Judges of B. R. who certifying the limitation to be good, the Lord *Hardwicke* in Mich. 1739, decreed agreeably thereto (2).

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(1) Reg. Lib. B. 1732. fol. 293. of Hil. term. 1732.

(2) Ca. temp. Tal. 245. et vide *Higgins* v. *Dowler*, ante 1 vol. 98.

1908. 1 Ch. 651.

TERM. S. HILLARII, 1732.

CASE 211.

1st, BANKS & al', Creditors of Robert Sutton, Plaintiffs;
JOHN SUTTON, Son and Heir of Robert Sutton, and MARGARET SUTTON, Widow of Robert Sutton, } Defendants.

2d, ROBERT SUTTON, Plaintiff;
MARGARET SUTTON and others, Defendants.

3d, MARGARET SUTTON, Plaintiff;
JOHN SUTTON & al'. Defendants.

At the Rolls. 2 Eq. Ca. Ab. 387. pl. 11. A resolution by Sir Joseph Jekyll, Master of the Rolls, that a widow should be endowed of an equity of redemption, though the mortgage was made in fee before the marriage, upon her paying a third of the mortgage money, or keeping down a third of the interest.

THE case upon the question reserved at the first hearing, concerning the claim of dower by *Margaret Sutton* the plaintiff in the third cause, is thus:

[701] *Peter Hancock* seised in fee of lands of 600*l.* per annum, mortgaged the same in fee to the late Chief Baron *Ward* for 4229*l.* In *April* 1708, *Hancock* made his will, whereby he devised his real estate in fee, and his personal estate, to Sir *William Ellis*, in trust to pay his debts and legacies, and to bring up and educate *Robert Sutton* the defendant's husband, until twenty-one or marriage, and then to settle a moiety of his estate upon him and the heirs of his body, and the other moiety to *Elizabeth* the wife of the plaintiff *Banks*, and the heirs of her body, with cross remainders, remainder over; the testator *Peter Hancock* died; Sir *William Ellis* entered on the real estate, proved the will, possessed the personal estate, paid off the mortgage, and took an assignment of it to a trustee for himself; 6th *April* 1720. *Robert Sutton* attained his age of twenty-one, married, and lived some years afterwards; Sir *William Ellis* did not settle the moiety of this estate

on *Robert Sutton* in tail, as he was directed by the will, but received part of the mortgage money, by perception of profits: *Robert Sutton* died, and afterwards his widow *Margaret Sutton* claims dower, and brings her bill to redeem the mortgage, to be let into her dower, and be paid her arrears since the death of her husband, offering to pay, or keep down, a third of the interest of the mortgage money remaining unsatisfied.

The testator seems to have thought, that the mortgage might be paid, either by his personal, or by the rents of his real estate, before *Robert Sutton* should come to twenty-one, and therefore directs the trustee Sir *William Ellis*, to convey a moiety of the estate, (which must be intended the legal estate of the premises) to *Robert Sutton* at his age of twenty-one or marriage. But supposing that by that time, the mortgage was not satisfied, yet plainly *Robert Sutton* was entitled to the redemption of the mortgage.

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Two questions arise on the present case:

1*st*, Whether the widow of a tenant in tail of a trust, to whom the legal estate is by the will directed to be conveyed at his age of twenty-one, and who lives to that age, shall have the aid of equity to help her to her dower?

2*dly*, Whether the widow of a person entitled to an equity of redemption of a mortgage in fee, shall be let in to redeem, on a claim of dower?

If either of these questions are with the plaintiff *Margaret*, she is entitled to a decree.

There has been a difference taken in equity by some, betwixt a tenant by the *curtesy* and tenant in *dower*, who have held that the former is more to be favoured: but this is a groundless distinction, and not supported by the resolutions of the Court. It may be proper to consider the nature and circumstances of *tenancy in dower*, and of tenancy by the *curtesy*, and compare them together.

1*st*, In 1 *Inst.* 33. *b.* Lord *Coke* says, that all kinds of dower were instituted for the subsistence of the wife during her life; which right of dower is not only a *legal* but a *moral right*, as it was held by Sir *John Trevor* the late Master of the Rolls, in the case of *Lady Dudley* and *Lord Dudley*, *Preced. in Chan.* 244. 2*dly*, The relation of husband and wife, as it is the nearest, so is it the earliest, and therefore the wife is the proper object of the care and kindness of the husband; the husband is bound by the law of God and man, to provide for her during his life, and after his death, the *moral obligation* is not

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at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own; if before her marriage she had a real estate, this by the coverture ceases to be hers, and the right thereto, whilst she is married, vests in the husband; her personal estate becomes his absolutely, or at least is subject to his control; so that unless she has a real estate of her own (which is the case but of few) she may by his death be destitute of the necessaries of life, unless provided for out of his estate, either by a jointure or dower. As to the husband's personal estate, unless restrained by special custom (which very rarely takes place) he may give it all away from her; so that his real estate (if he had any) is the only *plank* she can lay hold of, to prevent her sinking under her distress; thus is the wife said to have a *moral right* to a dower. The husband on the contrary has *no right* to a tenancy by the *curtesy*, but from positive institutions or provision of the laws; his right does not arise from the relation of husband and wife; for then every husband would have it, which is not so, nor doth the husband want it. If it be not his own fault, (or at least his misfortune) during the coverture he is master, not only of his own, but of his wife's estate; and by his industry and provident care may acquire property sufficient, without any part of her estate, to maintain himself after her death; so that the husband's tenancy by the curtesy hath no *moral foundation*, and is therefore properly styled a tenancy by the *curtesy* of *England*, that is, an estate by *favour* of the law of *England*.

Dower also is a legal right created by law; which settles the *quality* of the estate out of which the wife's dower arises,
[704] and likewise ascertains the *quantum* thereof. The common law says, a third part is *rationabilis dos*, and a special custom (which is *lex loci*) enlarges or abridges the common law of dower, and gives the whole, half, or less than a third. 1 *Inst.* 33. *b*. The common law likewise ascertains dower, with respect to the nature and quality of the husband's estate; it says, the wife's dower must come out of such an estate as would descend to the issue of the husband by that wife; and gives dower of the husband's seisin, though not actual, or reduced into possession. It annexes *privileges* to dower; as not to be liable to distress for the husband's debt to the king, much less for any due to the subject; with several other privileges. Again, the law fixes *the age* when a woman is dowable; and (by the way) fixes it at such a time, as by the course of nature (at least

in this part of the world) it seems impossible she should have issue, or be pregnant, (viz.) at nine years old: but it is not so favourable to a tenancy by the *curtesy;* which it allows only in the case of a seisin in deed; it annexes *no privileges* thereto; and though the husband may be tenant by the curtesy of a common *sans* number, of which the wife is not dowable, yet that is, because of its indivisibility, in which case, if dower were allowed, it would be injurious to other persons, and the lands doubly charged; thus the law, where it can justly do it, prefers the title of dower to that of curtesy.

3*dly*, Dower is also an *equitable right*, and such a one as is a foundation for relief in a court of equity; it arises from a contract made upon a valuable consideration; marriage being in its nature, a *civil*, and in its celebration, a *sacred* contract; and the obligation is a consideration moving from each of the contracting parties to the other; from this obligation arises an equity to the wife, in several cases, without any previous agreement; as to make good a defective execution of a power, a defective conveyance, or supply the defect of a surrender of a copyhold estate; in all which the Court relieves the wife, and makes a provision for her, where it is not unreasonable or injurious with respect to others: Indeed in the case of the husband, marriage, as it is a legal consideration, so is it an equitable one; but then it is not carried so far in his favour as in hers; and in the cases before mentioned, this Court would not supply a defective title for the husband; at least I have not known it done.

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Equity makes good defective executions of powers for a jointure or other provision for a wife, though after marriage.

By the common law, where a husband had an inheritable estate, it was part of the marriage contract, that the wife should have her dower, one *species* of which was *ad ostium ecclesiæ. Litt. Sect.* 39. "when the husband comes to the church-"door to be married, after affiance or troth plighted between "the husband and wife, he endows her," which implies, that such endowment is *before* the marriage completely solemnized; and though my Lord *Coke* says, such dower is *after* the marriage solemnized, this is a mistake. Also by the *Romish* ritual used here before the reformation it appears, that all marriages were celebrated *ad ostium ecclesiæ;* so that it should seem to be incumbent on the husband, if he could do it, to endow his wife, and to specify the dower upon the marriage, instead of which, the general words of endowing *with all his worldly goods* in the office of matrimony now in use, have come in; from whence it is to be inferred, that dower is, and time out of mind has been, a part of the marriage contract, when it came

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to be publicly solemnized, and if so, a right of dower is
[706] founded in contract, and is therefore an equitable right, to which a tenant by the curtesy has no pretence. For this reason I cannot but wonder how it ever came to be thought, that a tenant by the curtesy was entitled to relief in equity more, or farther, than a dowress; and particularly, that a tenancy by the curtesy might be of a trust estate, but not dower; which is no less than a direct opposition to the rule and reason of the law, allowing dower of a seisin in law, but not a tenancy by the curtesy, because the wife cannot gain an actual seisin, but the husband may; which reason holds in a trust-estate, for the wife cannot gain or compel a trustee to convey the legal estate to the husband, but the husband himself may; therefore, if any distinction is to be made, dower (one would think) ought to be preferred to curtesy.

I admit the Lord *Sommers* decreed, in *Snell* and *Clay*'s case, 2 *Vern.* 324. that a tenant by the curtesy should have the benefit of a trust-term attendant on the inheritance, and denied it to a dowress in those of Lady *Bodmin* and *Vandebendy*, and *Brown* and *Gibbs*, which occasioned such a distinction to be advanced; but it hath been exploded, or declared unreasonable, as often as mentioned ever since, and the Lord *Sommers* himself, when the case of *Snell* and *Clay* was urged in that of *Brown* and *Gibbs*, as an authority for a dowress, it being taken for granted that there was no difference in reason, between the case of dower and that of curtesy: I say, Lord *Sommers* seems to admit there was no difference; for he avoided the authority of *Snell* and *Clay*, by saying, that point of a tenant by the curtesy's having the benefit of a trust-term, was not *debated* in that cause.

But as such a distinction has been advanced, and the boun-
[707] daries of relief in equity to a dowress are not fixed, I will endeavour to find out, in what particulars these boundaries have, or have not been, already established; and then see, whether things might not be reduced to some certainty, beginning with such as have been settled.

A dowress shall have the benefit of a trust-term against an heir, or devisee, but not against a purchaser.

First, A dowress *shall not* have the benefit of a trust-term attendant on the inheritance, against a (1) *purchaser* (*z*); this,

(1) So, *Swannock* v. *Lyford*, (by some mistake reported in 2 Atk. 209, by the name of *Hill* v. *Adams*) Reg. Lib. B. 1740. fol. 327.

(*z*) That is, if the term has been assigned to a trustee for the purchaser; otherwise it will not protect him against the claim of dower. *Swannock* v. *Ly-*

after different opinions of two Chancellors (*Jefferys* and *Sommers*) was settled by the judgment of this Court, and affirmed by the House of Lords in the case of Lady *Bodmin* and *Vandebendy*, reported in the *Abridg. of Cases in Eq.* 219. where the other books, in which it was then to be found, are referred to, and is since reported in *Preced. in Chan.* 65. by the name of Lady *Radnor* and *Rotherham*. It seems, that by the same reason, as a dowress shall not have the benefit of a trust-term attendant upon the inheritance against a purchaser of the legal estate, so she shall have no relief in equity against a purchaser of the inheritance of a trust-estate; for in both cases the purchaser ought to be safe.

2*dly*, A dowress *shall* have the benefit of a trust-term attendant on the inheritance, against an *heir;* though this was denied in the case of *Brown* and *Gibbs*, *Precedents in Chan.* 97. by the Lord *Sommers*, and in *Wray* and *Williams*, 151 in the same book, by the Lord Keeper *Wright*, (though contrary to his own opinion) he thinking himself bound by the judgment in the case of Lady *Bodmin* and *Vandebendy*. The same question came afterwards to be considered by the late *Master of the Rolls*, in the case of *Lady Dudley* versus *Lord Dudley*, (*Precedents in Chan.* 241.) and upon great deliberation, in a solemn argument, he decreed for the dowress, as did the Lord *Harcourt* in *Higford* and *Higford*, *Paschæ* 1711, (and not in 1710, as is falsely printed in the *Abridgment of Cases in Equity* 219.) and upon a bill of review brought in the case of (*a*) *Wray* and *Williams*, and a demurrer thereto which was argued before him 18 *Feb.* 1711, he declared his opinion for the dowress, over-ruling the demurrer; and afterwards the defendant submitting, a decree was made by consent, fixing a sum for the arrears of dower, and giving her possession; agreeable to Lord *Hale*'s opinion in *Hard.* 489, and to all the resolutions in the case of tenant by the curtesy; so that this point seems settled, both as to dowresses and tenants by the curtesy (1).

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(*a*) Vide vol. 1. 137.

Next I will consider the case of dower of a trust, of the *whole inheritance*, not against a *purchaser*, but an *heir;* and this in two respects:

1*st*, In case of a trust created by the *husband* himself; 2*dly*,

(1) Vide *Duke of Hamilton* v. *Lord Mohun*, ante, 1 vol. 121. *Williams*, ante, 1 vol. 137. Harg. Co. *Wray* v. Lit. 208. *a.* note.

ford, ub. sup., Amb. 6, and Harg. Co. Litt. 208 a., *Wynn* v. *Williams*, 5 Ves. 130. *Maundrell* v. *Maundrell*, 7 Ves. 567, 10 Ves. 246. *Doe* v. *Hilder*, 2 B. & A. 782.

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Of a trust created by *another person*, the ancestor, or donor of an estate to the husband.

1*st*, Of a trust created by the husband himself.

* Octavo edit.

The first case of this kind *Colt* and *Colt*, * 1 *Chan. Rep.* 254. but the year and folio of the register-book there set down are false printed; it is the 15 *Car.* 2. *fol.* 794, and was a claim of dower of a trust created by the husband himself, as is the case of *Bottomly* and *Fairfax*, *Preced. in Chan.* 336, and that of (*b*) *Ambrose* versus *Ambrose*, heard in this Court 1716, and affirmed in the House of Lords in *June* 1717. Where therefore the trust of an inheritance is created by the husband himself, I take it to be settled, that the wife shall *not* have dower, even against the *heir*, nor against a *devisee*, the cases in reason being the same.

(*b*) Vide vol. 1. 321.

In case of a trust of an inheritance created by the husband himself, the wife shall not have dower.

* But 2*dly*, Whether the wife shall have dower of a trust of an inheritance created by *another person*, as against the heir or devisee, is a very different question. That the wife shall not have dower of a trust created by the husband, or (which is all one) of a purchase made by him, in a trustee's name, may be reasonable, since it may be presumed to be done with intent to bar dower, and every man may do as he pleases with his own. Accordingly it has been commonly practised, for a purchaser to take a conveyance in his own name and in the name of another person as trustee, purposely to prevent dower. It is said in *Shower's Parliament Cases* 71, that Serjeant *Maynard* made a long lease to a servant, on purpose to prevent dower; and the case of *Bottomly* and *Fairfax* in the book before mentioned, seems to go upon the act and intention of the husband; the words being these, "in this case, it was clearly agreed, "that if a husband, before marriage, conveys his estate to "trustees and their heirs, in such manner as to put the legal "estate out of him, though the trust be limited to him and "his heirs, yet of this trust-estate the wife, after his death, "shall not be endowed, and this Court hath never yet gone so "far, as to allow her dower in such a case:" But where there is no conveyance to trustees by the husband in order to put the legal estate out of him, and the equitable interest (which in this Court is taken for the whole) descends or comes to the husband from another, who cannot be presumed to have lodged the legal estate in trustees to prevent dower out of the estate of a future *cestui que trust* (perhaps one not then born,) this seems to differ in reason, and does so by the authorities: I find no resolution against dower in such case, but on the contrary some allowing that, as well as tenancy by the curtesy.

Secus where the trust is created by another person or the husband's ancestor.

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The first is a very strong one, determined upon great deliberation, and with great perseverance in opinion; for it came no less than five times before the Court in one shape or another; it is very imperfectly reported in all the printed books, though best in the *Preced. in Chan.* 250, but hath not been thoroughly understood; I took it out of the register's book which cannot deceive; the case was thus: *Henry Robinson*, for a valuable consideration, agreed to assure the manor of *Binton*, and other lands in the county of *York*, to *Henry* his eldest son in fee; but falling into trouble for counterfeiting a patent under the great seal, conveyed the estate to *John* his younger son in fee, to prevent a forfeiture, and the younger son executed a declaration of trust to the father, who being afterwards freed from his troubles, conveys the estate to his eldest son, and dies; the eldest son dies, leaving a widow (the plaintiff) and no issue, whereby the younger brother became his heir; against whom the plaintiff brought her writ of dower, and a bill in this Court, to set aside the conveyance made to the defendant, as an impediment at law to the recovery of her dower. The Court thought this a case fit to be maturely considered, and ordered it to be stated by one counsel on each side. On the 6th of *May* 1653, the cause came to be heard on a case so stated, which was, in substance, as I have mentioned, and concludes thus:

"So that upon the whole matter, the case upon the bill, "answer, and proofs, will fall out to be, that *Henry* the father "being *cestui que trust* in fee, conveyed to *Henry* the son (*i. e.* "eldest son) and his heirs, and *Henry* the son died; now "whether the wife of the son (the interest in law being still in "the trustee, that is the younger son) shall be holpen to dower "in equity, is the single question? whereupon the Court is "of opinion, that there is good ground to set aside the said "deed made to *John* the youngest son, and that the plaintiff "should have her dower out of the said manor of *Binton*, and [711] "other the lands conveyed to the plaintiff's husband and his "heirs, for the time to come, and to the arrears thereof from "the death of her husband:" and it was decreed accordingly, unless cause, the defendant then making default. On the 13th of the same month (being the time appointed for that purpose) the defendant's counsel coming to shew cause, on hearing counsel on both sides, it was decreed, that the deed to the younger son should be set aside, as against the plaintiff, and not given in evidence at law, and that, as to the arrears of dower the plaintiff should resort to the Court for farther directions, after a trial at law; which being accordingly had, the

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deed was notwithstanding the decree, given in evidence, and the plaintiff nonsuited; whereupon on the 9th of *October* 1654, she applied again to the Court, and prayed a commission to set out her dower, that proceedings on the non-suit might be stayed, that she might have her costs at law and in this Court, and that the defendant and his attorney, who insisted on giving the deed in evidence at the trial, might stand committed; which was ordered accordingly, unless cause shewn to the contrary on the 28th of *November* following; at which time, upon hearing counsel on both sides, the order of the 9th of *October* was made absolute.

I observe, notwithstanding the deed to the eldest son was upon an agreement for a valuable consideration, yet in all likelihood it was so worded, as to exclude giving the consideration in evidence; or there was some other objection made, whereby it could not prevail at law against the deed to the
[712] younger son, though that was voluntary; and accordingly it was taken for granted by the counsel on both sides, and by the Court, that the law was against the plaintiff; for which reason she was nonsuited upon the trial; and yet, notwithstanding there was no legal seisin in her husband, she had her dower by the aid of this Court. This seems a great authority for dower out of a trust-estate of inheritance, and was very much relied on by the late *Master of the Rolls*, in his argument of the case of Lady *Dudley* and Lord *Dudley;* for after taking notice of it, he says, "though this was much contested, yet "equity prevailed; and though the time in which it was ad- "judged, may be objected, yet were † they (meaning the then "Commissioners of the Great Seal) learned men, who deli- "berated well, and pronounced their decrees according to their "oaths, and according to justice and equity." *Precedents in Chanc.* 250. This resolution of *Fletcher* and *Robinson* does not stand alone; for at the end of the case of *Otway* and *Hudson*, decreed by the Lord *Cowper*, 27 *October* 1706, 2 *Vern.* 585, it is said, that the widow of a *cestui que trust* of a copyhold estate ought to have her widow's estate (*i. e.*) customary dower, as if her husband had the legal estate in him; and a husband ought to have a tenancy by the curtesy of a trust, as well as of a legal estate. And as dower is more favoured in law, reason, and equity, than curtesy, therefore every precedent for tenant by the curtesy of a trust, is an authority for dower of a trust. The case of *Sweetapple* and *Bindon*, 2 *Vern.* 536. is thus: a woman bequeathed 300*l.* to be laid out in land and

The widow of the cestui que trust of a copyhold estate shall have her free bench, as well as if her husband had the legal estate.

† The Commissioners for the custody of the Great Seal at that time were *Widdrington*, *Whitlock* and *Lisle*. Vide *Whitlock's Memoirs*, sub anno 1654.

settled to the use of her daughter with a remainder over; the daughter married the plaintiff, by whom she had a child, she and the child died, and the money not being laid out, on a bill brought by the husband, the Lord *Cowper* decreed the money to be considered as land, and the plaintiff to be tenant by the curtesy. In that of (*a*) *Watts* and *Ball*, cited imperfectly 2 *Vern.* 681, as determined by the Lord *Cowper* in 1708, where the inheritance was in trustees for payment of debts, the surplus to the testator's two daughters equally in fee; he decreed the husband of one of the daughters to be tenant by the curtesy of that daughter's moiety; and there, according to a full report I have of the case, the Lord *Cowper* declared, that the husband ought to be tenant by the curtesy, and the rather, as he thought his wife seised of a legal estate, and had reason to think so, she being in possession; but this appears to be only an additional reason for decreeing the tenancy by the curtesy, since his Lordship laid down the rule generally, that trusts are to be governed by the same law, and are within the same reason, as legal estates; and if there were not the same rule of property in all courts, things would be at sea, and there would be the utmost uncertainty; which general position extending to the case of dower, as well as tenant by the curtesy, may be reckoned an authority for the one, as well as the other. That trusts and legal estates are to be governed by the same rules, is a maxim which has obtained universally; it is so in the rules of descent, as in *Gavelkind* and *Borough-English* lands, there is a (*b*) *possessio fratris* of a trust, as well as of a legal estate; the like rules in limitations, and also of barring entails of trusts, as of legal estates. I believe there is no exception out of this general rule, nor indeed is there any reason there should; and it would be impossible to fix the boundaries, and shew how far, and no farther it ought to go; perhaps in early times, the necessity of keeping thereto was not seen, or thoroughly considered.

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(*a*) See vol. 1. 108. reported as here cited.

(*b*) 1 Inst. 14. b. 1 Co. 121. b.

Perkins (who wrote before the statute of uses) *fo.* (*c*) 69, says there shall be no dower of an use; but to shew that he took it a tenant by the curtesy stood upon the same foot as a tenant in dower, *fo.* 199, (*d*) he says, that there shall be no tenant by the curtesy of an use; probably the other books, where the same thing is said, may be taken from this authority: but it is to be observed, that this might possibly be said with regard only to demand of dower at law, and not in a court of equity; but however, if the opinion that a wife should not be endowed of a trust, has been in former times, taken generally,

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(*c*) § 349.

(*d*) § 457.

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yet that which has for a long time prevailed is, that trust-estates ought to have the same properties, and be governed by the same rules, as legal estates.

(*a*) 27 H. 8. cap. 10.

As to the preamble to the statute of (*a*) uses, which recites, "that by uses men lost their tenancies by the curtesy, and "women their dowers," there is room to think these words ought not to be taken in a general sense; for the uses complained of were such as were created by fraudulent assurances, and were secret; but supposing all uses, before the statute, were thought to bar tenants by the curtesy, and dower, even in equity as well as law, yet it will not follow, at this time of day, that trusts or equitable interests are now to be considered as they were then. Besides, as to authorities for dower out of trust-estates, it is admitted that a dowress shall have the benefit of a trust-term attendant upon an inheritance, and yet it cannot be in reason distinguished, why a dowress shall not have the benefit of a trust of the whole inheritance. It has indeed been said, that in the one case the dower by law, had attached on the inheritance, which attracts the term; whereas in the other the wife has no legal right at all; but this seems to be a difference in words only; for why should her dower out of the inheritance give her the benefit of a trust-term, when by law she cannot have her dower, during the term? why should equity assist the dowress in the one case more than in the other, when at law, without the aid of equity, she cannot have title in either? why should a dowress have the aid of equity to be endowed out of a trust-term more than of a trust of inheritance? nay, after a judgment in dower, with a *cesset executio* during the term (as it must be;) if she hath dower out of the trust-term, she has it in direct contradiction to the judgment upon which she founds her claim, where she comes after judgment, as the cases generally have been; this is the observation of the Lord *Sommers* in the case of *Brown* and *Gibbs* before cited, where his Lordship says, that it would be relieving her against the very judgment upon which she founds her right to relief; and yet hath obtained, and is a point now settled.

A dowress shall be aided in equity against a trust-term attendant on the inheritance.

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But after all these reasons and authorities, I must declare, that I would not take upon myself to determine, whether a wife should have dower out of a trust of inheritance, where it is created not by the husband, but some other person, and no time limited for conveying the legal estate; when that comes to be the case it will be time enough to do it; but the present very much differs from the common case of trust-

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The widow of a tenant in tail of a trust, to whom the legal estate is by the will of the donor directed to be conveyed at his age of 21, and he living to that age, is entitled to dower.

estates, in that there is a time limited for conveying the legal estate, and that time come in the life of the plaintiff's husband; this makes it clear for dower, upon a principle well known and established in this Court, that where an act is to be done by a trustee, that is to be looked upon as done which ought to be done, consequently the estate directed to be conveyed to the plaintiff's husband ought to be considered as actually conveyed to, and vested in him; and then the plaintiff hath a right to dower out of it.

* 2*dly*, Suppose the legal estate is not to be considered as conveyed to the plaintiff's husband, by reason of the mortgage standing out unsatisfied during his life, yet, however, the husband was undoubtedly entitled to redeem the mortgage, and then the other point before mentioned is to be considered, whether the plaintiff, being the widow of a person entitled to the equity of redemption of a mortgage in fee, hath a right to redeem upon account of dower?

[* 716]

That a dowress shall have redemption of a mortgage for years is a point settled; and as that was never doubted, so neither has the Court ever distinguished it from the case of a mortgage in fee. The Lord *Sommers*, in the case of *Brown* and *Gibbs*, seems to admit, that a dowress may redeem a mortgage; and gives a reason for it, which goes to a mortgage in fee as well as for years; he says, "a mortgage is looked upon "as a personal contract, and the mortgagee has no interest "beyond his money." In that of *Hitchin* and *Hitchin*, *Precedents in Chan.* 133. though it was a mortgage for years, yet the Lord Keeper *Wright* does not distinguish, but (speaking to the counsel) says generally, "you do not pretend but a "dowress is to be relieved against a satisfied mortgage:" Now the case of a satisfied or an unsatisfied mortgage differs only in this; in the one the Court gives the dowress relief absolutely, in the other, upon terms of keeping down a third of the interest, or paying a third of the principal; though as to the mortgagee, the dowress must pay the whole money, and hold over for the residue. The case of *Palms* and *Danby*, *Precedents in Chan.* 137, was a mortgage for years, (though not so reported) but the question is there stated generally, whether a dowress had a right to redeem a mortgage? and the same Lord Keeper declared it to be his opinion that she had. I see no reason for a difference between a mortgage in fee and for years, as to the dowress's redeeming in a court of equity; the interest in the mortgage-money and the equity of redemption is the same, whether it be for years, or in fee; the mort-

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gage in both cases is personal estate, goes to the executor, and not to the heir; the equity of redemption in both goes to the heir, not to the executor; however, there are authorities *a pari*, or rather *a fortiori*, that a mortgage in fee shall no more preclude a dowress, than one for years. In the case of *Thorn* and *Thorn*, 1 *Vern.* 182, 183. it was twice held by the Lord Keeper *North*, that a mortgage in fee was a revocation only *pro tanto*, of a voluntary settlement with power of revocation; and in that of *Hall* and *Dunch*, 1 *Vernon* 329, it was held by the then *Master of the Rolls*, that a mortgage in fee was a revocation only *pro tanto*, of a devise; which last coming upon an appeal before the Lord Keeper *North*, 1 *Vern.* 342, he affirmed the decree for this reason (says Mr. *Vernon*) because the intent of the mortgagor could be only to supply his present occasions, by borrowing money, which is pretty near the same reason as was given by the Lord *Sommers* in the case of *Brown* and *Gibbs*, and is equally applicable to mortgages in fee or for years; the like reason is given in the case of the Earl of *Lincoln* and *Rolle*, *Parliament Cases* 156, where it was admitted by the counsel on both sides, that a mortgage in fee was not a revocation of a devise; say the counsel for the appellant, because in equity the mortgage does not make the estate another's: and the counsel for the respondent, because a mortgage is not an inheritance but a personal estate.

Now surely if a devisee who is a *mere* volunteer, or if a grantee with a power of revocation, who is a volunteer *to the utmost degree*, shall in equity be entitled to the redemption of a mortgage, *a fortiori* shall the dowress be so: the law is
[718] as much against the devisee as against the dowress; yet equity interposes in favour of the devisee, a mere volunteer, relieving against a revocation by the devisor; and this too, when by making a mortgage in fee, and limiting the redemption to him, and *his heirs*, he hath in some sort declared his intention, that the mortgaged premises shall go to his heirs, and not to the devisee. Besides, in case of a devise, any act done to put the estate into another plight than it was at the time of the devise, is (regularly) a revocation, though probably not so intended by the devisor, as was held in that case of the Earl of *Lincoln* and *Rolle*; this therefore seems to be much stronger against the interposition of the Court than that of a wife, who, in respect to dower, is not a mere volunteer, but founds herself upon the marriage contract, or however, in the several instances before mentioned, is relieved where a mere

volunteer is not; and therefore a dowress ought, *a fortiori*, to have the redemption of a mortgage in fee, rather than a devisee; especially if it be, as this case is, of a mortgage not made by the husband himself, but by the donor of the estate.

How far these reasons and authorities in case of dower out of an equity of redemption of a mortgage in fee, will weigh in that of dower out of a trust of the inheritance against the *heir*, may be considered when that question comes before the Court. Indeed in *Robinson* against *Tong*, heard before the late Lord Chancellor (6 *Nov.* 1730.) the case appeared to be the same, viz. that of a widow claiming dower out of an equity of redemption on a mortgage in fee, not made by the husband himself; which was insisted to be the same with dower of a trust of the inheritance; and the case of *Ambrose* and *Ambrose* before mentioned was cited, where dower of a trust-estate, created by the husband himself, was denied; [719] though it was admitted, there might be a tenancy by the curtesy of it; this the Lord *King* thought a groundless distinction, but, without attending to the difference between a mortgage and a trust, or observing, that in the case of *Ambrose* and *Ambrose* the trust was created by the husband himself, and in that before him, the mortgage was made, not by the husband, but by his brother (of whom the husband purchased the equity of redemption;) he says, the best way is *stare decisis;* but however, did not determine the point against the dowress; for by the decree it appears, that the estate in mortgage upon which the question arose is directed to be sold, and the Master to inquire, whether the defendant the widow be dowable of any estate of her husband's; and if she be, the Master to put a value upon her dower, which is to be paid out of the money arising by the sale, preferable to her husband's creditors, except the mortgagee, and an annuity charged on the estate subject to which the husband purchased (1).

I do not know, nor can find any instance, where a dower of an equity of redemption was controverted, and adjudged against the dowress; and as there are authorities in cases less favourable, therefore I declare, that the plaintiff being the widow of the person entitled to the equity of redemption of this mortgage in question (which was a mortgage in fee) hath a right of redemption; and accordingly decree her the arrears of her dower from the death of her husband, she allowing the

(1) Reg. Lib. B. 1730. fol. 142.

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(2) However it is now settled that a wife shall not be endowed of a trust estate of inheritance, or of an equity of redemption of a mortgage in fee, *Chaplin* v. *Chaplin*, post. 3 vol. 229. *Attorney General* v. *Scott*, Ca. Temp. Talb. 138. *Godwin* v. *Winsmore*, 2 Atk. 525. *Burgess* v. *Wheate*, 1 Black. Rep. 138. 161 (*z*). *Dixon* v. *Saville*, 1 Bro. C. C. 326 (*y*).

(*z*) S. C. 1 Eden, 177.

(*y*) *Curtis* v. *Curtis*, 2 Bro. C. C. 630. *D'Arcy* v. *Blake*, 2 Sch. & L. 386. So, a widow shall not have free-bench of a trust estate of a copyhold, *Forder* v. *Wade*, 4 Bro. C. C. 521.

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[720]

CASE 212.

DE

TERM. S. MICHAELIS, 1734.

1908.1.Ch.659.

WILLIAM COWPER, Esq. Cousin and Heir of William Cowper only Son of the late Earl Cowper by his first Wife, and eldest Son of Spencer Cowper, who was Uncle and Heir of the same William Cowper; THEODORA COWPER Widow and Administratrix of Spencer Cowper, Esq; JOHN COWPER and ASHLEY COWPER his younger Sons, and MARTIN MADAN and JUDITH his Wife the only Daughter of the said Spencer Cowper, Plaintiffs;

WILLIAM EARL COWPER, Son and Heir of the late Earl Cowper by the late Countess his Wife, THOMAS WOODFORD surviving Executor of the late Earl, SIR WILLIAM HUMPHREYS and ORLANDO HUMPHREYS, Executors of Mary Booth surviving Executor of Robert Booth, THOMAS POWELL and WILLIAM POWELL, Executors of Samuel Powell a Trustee named in Mr. Booth's will, and also another of his Executor, Defendants.

2 Eq. Ca. Ab. 538. pl. 3. 726. pl. 1. The argument of Sir Joseph Jekyll Master of the Rolls.

THIS case, as it is very extraordinary, so it is of a large compass, and every part requiring consideration, I must therefore

necessarily take up some time in stating, observing, and arguing upon it, for maintaining the judgment that I shall give.

Robert Booth a freeman of *London*, seised of a small real, and possessed of a large personal estate, had one only child named *Judith*, who intermarried in her father's life-time with *William Cowper*, Esq. afterwards Earl *Cowper*, and had issue by him only one son named *William*.

On the 5th of *July* 1690, Mr. *Booth* made his will, whereby, after making provision for his wife, in lieu of what she might claim by the custom of *London*, he takes notice, that he had before given his daughter 5000*l.* upon her marriage, which he did not intend to be in full of her orphanage part, and therefore makes a farther provision for her in these words, "I do "farther give and bequeath 4500*l.* unto Mr. *Samuel Powell*, "upon this special trust and confidence, that he shall, with all "convenient speed, lay out the 4500*l.* in the best manner he "can, in the purchase of lands and tenements of inheritance, "to be conveyed and settled to him upon the several uses, "intents and purposes herein after mentioned, that is to say, "in trust for and to the use of my son and daughter *William* "*Cowper*, Esq. and *Judith* his wife for the term of their lives, "and *after the decease of my daughter*, then to the child or "children of her body hereafter to be begotten share and share "alike, and for want of such issue, then to my grandson "*William Cowper* and his heirs for ever." He farther by his will charged some annuities upon a leasehold house he had in St. *Helen's*, *London*, gave several legacies, and devised the small real estate he had to his cousin *Thomas Heirdson* for life, with remainder over, and then gives all the residue of his [722] estate, not before disposed of, to his daughter, desiring that what it should amount to over and above the 4500*l.* might be laid out with the 4500*l.* to the same end, and for the same uses, as are in that (the above recited) clause expressed, and made the said Mr. *Powell*, his wife *Mary Booth*, and his daughter *Judith Cowper*, his executors.

On the 1 *November* 1690, Mr. *Booth* died, and the three executors joined in the probate of the will, but Mr. *Cowper* (in right of his wife) acted as executor, and possessed the personal estate.

On the 16th of *June* 1692 my Lord *Cowper* (then *William Cowper*, Esq.) executed a declaration of trust, whereby, after reciting the will, and that he in right of his wife (the heir and residuary legatee of Mr. *Booth*) had received of Mr. *Booth*'s personal estate (including a mortgage then unpaid on lands in

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Gloucestershire) assets above all debts and legacies, sufficient to answer the 4500*l.* and that he had lately purchased an estate at *Standon* in *Hertfordshire* for 3400*l.* he declared that estate was bought by him with the money arising out of Mr. *Booth*'s personal estate, and was to be taken as part of the 4500*l.* and that he had taken a conveyance to himself, to the intent, that as soon as the whole purchase for the said 4500*l.* could be completed, he and his heirs should settle and convey the same according to the true intent of the will, or as near as might be at the time of such settlement, and that in the mean time, the rents and profits should be received by such persons respectively, as would in right and justice be entitled thereto, in case such conveyance were made.

On the 5th of *July* 1697 my Lord *Cowper* executed a declaration of trust of three fifths of other lands purchased by him, wherein, taking notice that he had deposited the former
[723] declaration of trust in the hands of Mr. *Powell*, he declared the trust of the three fifths of those lands in the same manner as he had declared that of the other lands, and having sold part of the other lands, he declared that the three fifths of those lands with the lands unsold of the first purchase, did exceed the value of 4500*l.* as they really did. This declaration was also deposited with Mr. *Powell*, and both were found among his papers, as appears by the answers of his executors.

In 1697, or 1698, *William Cowper* the son died an infant of tender years, and in *April* 1705 died *Judith* the mother.

On the 6th of *November* 1722 the late Earl *Cowper* made his will, and after subjecting his real and personal estate to divers charges, and to debts and legacies, he devised his real estate to the defendant the present Earl for life, remainder to his executors, as trustees to preserve contingent remainders, remainder to the defendant's first and other sons in tail male successively, and after several like remainders to *Spencer Cowper* his youngest son, and every other son to be begotten, for life, and their first and every other son successively in tail male, he limited a remainder to his brother *Spencer Cowper* for life, remainder to the plaintiffs *William*, *John* and *Ashley Cowper* and every after-born son of his brother *Spencer Cowper* for life, and to their first and every other sons successively in tail male, with proper limitations to trustees to preserve contingent remainders, remainder to the right heirs of the Earl. By a codicil of the same date with the will, he bequeathed the residue of his personal estate to his executors, in trust to be laid out in the purchase of lands to be settled to the

same uses as he before had devised his real estate, and so as they, and all the lands he was then seised of, might go with the honour, and made his brother *Spencer Cowper* and the defendant *Woodford* his executors. [724]

On the 10th of *October* 1723, Lord *Cowper* died, soon after which both the executors proved the will, and on the 16th of *November* following, they filed their bill against the present Earl *Cowper*, the late Countess, Lady *Sarah*, Lady *Anne* and *Spencer Cowper*, (the late Earl's younger children) and against *William*, *John* and *Ashley Cowper*, three of the plaintiffs in this cause, in which my Lord's will being recited *verbatim*, it is alleged, that the plaintiffs were unwilling to meddle with any of the estate, but what was of absolute necessity for the funeral and other immediate occasions: but it being necessary to take some money for those purposes, the plaintiff *Spencer Cowper*, on the 15th of *October* 1723, in the presence of Mr. *Woodford* and Mr. *Sydenham* (the late Earl's stewârd) took out of an escritoir in my Lord's house in *George-street* 1670*l.* in bank-bills, of the disposition whereof the bill gives an account, and that since, (viz.) on the 20th of the same *October*, the plaintiffs went to *Colne-green*, my Lord's house in the country, and in Mr. *Sydenham*'s presence, opened a bureau of the testator's, took thereout 187*l.* 12*s.* 6*d.* ½. which was paid to the Countess, and that all the rest of his personal estate remained in the same plight and condition as it was at the Earl's death; that it being necessary to prove the will *per testes*, and the plaintiffs being unwilling to execute the trusts thereof without the direction of this Court, the bill prays, that the defendants may set out their claims on the real and personal estates of the late Earl, that the legatees may be paid, and an allowance settled for the maintenance of the present Earl, and my Lord's other children, that the surplus rents and profits of the whole estate may be disposed of for the Earl's benefit, a receiver appointed, the plaintiffs account for the personal estate, and be indemnified, the will and codicil proved and established, and the trusts thereof completely executed. On the 21st of *December* 1723, the Earl, then an infant, answered this bill, and insisted on his being heir at law, and entitled to the late Earl's real estate, in case the will was not well proved. On the 13th of *March* following, *William*, *John* and *Ashley Cowper* answered, and admitted the will and codicil, hoping the trusts should be fully executed, and that the remainders limited to them would be decreed. [725]

On the same day the Earl, by his next friend, filed a cross-

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bill against Mr. *Spencer Cowper*, and Mr. *Woodford*, and against his brother and sisters, praying that the defendants might set forth their several claims and demands of what kind or nature soever, upon the real and personal estates of the late Earl, and might account for them; and that if the will was duly executed, an execution of the trusts might be decreed according thereto. Mr. *Spencer Cowper* put in his answer the day the bill was filed, and thereby gave the same account, as by the original bill, of the taking 187*l.* 12*s.* 6*d.* ½. out of a bureau at *Colne-green* on the 20th of *October*, in the presence of Mr. *Woodford* and Mr. *Sydenham*, and that besides that and 1670*l.* 5*s.* taken out of the house in *George-street*, and some other particulars set forth in his answer, he had never received any part of the personal estate, or meddled therewith; that he had caused an iron chest to be opened in the presence of Mr. *Woodford*, and Mr. *Sydenham*, in which were securities, monies and other things, which chest was locked again with three keys, whereof each of them kept one, that the chest was deposited with him, and remained in the same condition, ready to be delivered as the Court should direct: that he believed there might be some few things in
[726] an escritoir or chest at *Colne-green*, whereof he had the key, but knew not the particulars, and desired it might be brought up and delivered as the Court should direct, he not intending to intermeddle therewith; that he had no farther or otherwise concerned himself with the personal estate, having determined to act as little as possible without the direction of the Court; that he could not set out an account of the late Earl's real estate, but referred to Mr. *Sydenham* for that purpose, and said he was very desirous the trusts of the will should be fully executed, an account taken of the real and personal estate, and the surplus laid out in a purchase, as the will directed, after funeral charges, debts, legacies, and all just demands thereout deducted and paid; in order to which, he set out Mr. *Booth*'s will, and stated his claims under it in the same manner as I have before mentioned, and as is done by the present bill, insisting that his title to the benefit of the trust in Mr. *Booth*'s will accrued from the death of *Judith* the late Earl's first wife; that he believed the late Earl possessed the real and personal estates of Mr. *Booth*, and that the trust had not been fully executed; and therefore he insisted, "that "he was entitled to the real estate of Mr. *Booth* undevised, and "to the sum of 4500*l.* and interest, or to any estate purchased "therewith, and to an account of the surplus of Mr. *Booth*'s

" personal estate, with interest from the death of the said " *Judith;* but that he conceived it might be proper by a bill " to be preferred by him against Mr. *Booth*'s surviving execu- " tors and other proper parties, to establish his demand, though " he found it necessary to disclose it by way of answer to this " bill, which was to discover what demands the defendants had " on the late Earl's estate; and therefore craved leave to re- " serve to himself the liberty of proceeding to establish his " demand as he should be advised, and saving to himself such [727] " his demand, as far as the same should appear just and " reasonable, he submitted to the execution of the trusts of " my Lord *Cowper*'s will."

Mr. *Woodford* likewise put in his answer, and said, he came to *Colne-green* the 13th of *October*, the *Sunday* after the Earl's death, and with the concurrence of the Countess, Mr. *Cowper*, the present Earl, and Lady *Sarah*, settled and agreed on the manner and charges of the funeral, and takes no other notice of what passed there at that time; that on the 15th of the same month, he attended Mr. *Spencer Cowper* his co-executor to *George-street*, where finding several papers, writings, letters, and accounts, many of which were cursorily passed over by them in the presence of Mr. *Sydenham*, some few principally concerning the testator personally, and of no concern or value to his estate, were, as he believed, taken away by Mr. *Cowper*, and in all other respects gave the same account of this transaction in *George-street*, as is given in the original bill, and in Mr. *Cowper*'s answer, saying, that the iron chest was removed to Mr. *Cowper*'s chambers; that amongst other things at the house at *Colne-green*, my Lord had a bureau or cabinet, in which were (as he believed) 187*l.* 12*s.* 6*d.* $\frac{1}{2}$. in money, which being on or about the 20th of *October* taken from thence, were delivered to Mr. *Sydenham*, and by him (as he believed) paid on account to the Countess.

The day before either of these answers put in, Mr. *Spencer Cowper* filed a bill against the present Earl, Mr. *Woodford*, and the surviving executor of Mr. *Booth*, and others, to establish his demand, in which Mr. *Booth*'s will and the two declarations of trust are set out *verbatim*, and his demand by this bill is the same as by his answer.

In *May* 1724, the present Earl was served with the *Lord* [728] *Chancellor*'s letter, and appeared, but was never called upon for an answer; and none of the other defendants were served, nor any other proceedings had upon this bill. In the other two causes replications were filed to all the answers, and on the

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10th day of *July* 1724, both causes were heard together, when the late Earl's will and codicil were declared to be well proved, and decreed to be performed; to which end an account of the personal, and of the rents and profits of the real estate was directed, and the Master to take an account of the testator's debts and legacies, whom the creditors should attend to make out their debts; that the surplus of the personal estate should be laid out in purchases, according to the Earl's will, and the surplus profits of the real estate improved for the present Earl's benefit.

In pursuance of this decree, on the 18th of *January* 1726, the Master having been attended by solicitors for the plaintiffs and defendants, made a general report of the personal estate, which then stood in the name of the late Earl, or of his executors, or which had been received by Mr. *Sydenham*, who, before the hearing, had by order of the Court been appointed receiver of the rents and profits of the real, and of the produce of the personal estate, in which report the leasehold estate at St. *Helen*'s, and the rent of it due at the Earl's death, are accounted for as personal estate, as are also the arrears of rent of the estate in *Hertfordshire*, concerning which the trusts had been declared by the Earl, and also a bond and note entered into by Mr. *Booth*, are mentioned as outstanding debts due to the Earl, and as part of his personal estate.

[729] On the 28th of *July* 1727, the Master, having been attended by Solicitors for the plaintiffs and defendants, as also by the receiver, made another report of his having passed the receiver's accounts of the rents and profits of the real, and of the interest and produce of the personal estate from the Earl's death, to *Michaelmas* 1726; these accounts comprise the rents of the estate in *Westmoreland*, of the house in *London*, and of the estate in *Hertfordshire*, and also the interest of the savings of the late Earl's estate which had been from time to time invested in securities for the now Earl's benefit according to the decree.

On the 10th of *April* 1728 the Master made another report of his having passed the receiver's accounts till *Michaelmas* 1727, and the succeeding accounts after Mr. *Spencer Cowper*'s death were passed in the same manner till the present Earl came to age. Indeed none of the reports were confirmed, nor is it usual to confirm reports of receivers' accounts, as all ex-

Not usual to have reports of receivers' accounts confirmed (*z*).

(*z*) *Shewell* v. *Jones*, 2 S. & S. 170.

cept the first are; and as to that, though it is not confirmed in common form, yet the following orders obtained at the instance of Mr. *Cowper* and Mr. *Woodford* are (I conceive) an implicit confirmation of it; for on the 12th of *November* 1724 an order was made on their motion, that several sums, part of the Earl's estate, then out upon securities, and expected to be paid in, should be placed out in *South-sea* annuities in their names; and on the 22d of *June* 1727 there was an order upon their petition to sell the stocks of which the Earl's personal estate then consisted, and lay out the monies arising from such sale in purchases. On the 8th of *March* 1727, they preferred another petition, reciting the decree, the report of the receivers' accounts, and that they were desirous to improve the savings [730] of the now Earl's estates, and had agreed to place out 10,000*l.* on a mortgage, which sum was to be advanced out of the clear produce of the real and personal estate of the Earl; that the receiver had, with their approbation, paid 7000*l.* in part, and would soon have 3000*l.* more in hand, and that the decree having only provided for placing out the surplus profits of the real estate, they apprehended it necessary to have an order for placing out and improving the clear produce of the personal estate in the same manner; they therefore prayed that the receiver might pay the 3000*l.* and that the mortgage might be made to them in trust for the Earl, and such farther sums, as from time to time should be saved for the Earl out of the personal as well as real estates, be placed out at interest and improved for the benefit of the Earl, in their names. On the 13th of *March* 1727, this petition was heard in the presence of counsel for the petitioners and the Earl, when it was referred to the Master to see if the security proposed was a good one, and if so, the receiver was to pay the 3000*l.* and the mortgage to be made to the petitioners in trust for the Earl, and the future savings of the personal estate were ordered to be improved for the Earl's benefit in their names.

This order hath been thus executed, (viz.) on the 17th of *July* 1728 the Master having been attended by solicitors for the plaintiffs and defendants, certified his approbation of the title and security; and on the 11th of *November* 1728, approved the mortgage deeds made to the plaintiffs by the description of trustees on behalf of the Earl. The money was paid, and the mortgage deed executed by Mr. *Woodford* only, after Mr. *Cowper*'s death, and in pursuance of an order for that purpose, this mortgage has been assigned to the present Earl [731] *Cowper* on his coming to age.

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During all these proceedings, Mr. Cowper *never made one single step towards proving his claim or demand, or towards coming in as a creditor under this decree; but suffered the rents of all these estates now claimed, to be accounted for as my Lord* Cowper's, and soon after, (viz.) on the 10th of *December* 1728, died.

The plaintiff *William* is his eldest son and heir, and as such is heir at law of *William Cowper*, the son of my Lord *Cowper*, by his first wife.

The plaintiff *Theodora Cowper* is Mr. *Spencer Cowper*'s widow and administratrix, and the plaintiffs *John* and *Ashley Cowper* and *Judith Madan* are his younger children, who have brought this bill (*mutatis mutandis* the same with Mr. *Spencer Cowper*'s,) to have an account of Mr. *Booth*'s personal estate not invested in purchases, of the rents and profits of the estates in *Hertfordshire* and *Westmoreland*, and of the house in *London*, to have a conveyance to the plaintiff *William Cowper* of the estates in *Hertfordshire* and *Westmoreland*, and an assignment to him of the term in the house in *London*.

The defendants all answered, but none of them are concerned in interest, except the defendant the present Earl.

The estate in *Westmoreland* was only a mortgage, and the house in *London* a leasehold for years; they were therefore both part of the personal estate of Mr. *Booth*, and to be governed by his will; the rents and profits thereof were received by my Lord *Cowper* during his life, and after his death
[732] brought into the receiver's accounts as part of his Lordship's estate.

Now, as to any account of the personal estate of Mr. *Booth* received by my Lord *Cowper* and not invested in purchases, or of the rents and profits of the *Hertfordshire* and *London* estates received by his Lordship, or of those received after his death, and brought into the account taken in this Court pursuant to the decree before mentioned: I am of opinion, that the bill ought to be dismissed; and as to all the personal estate of Mr. *Booth*, possessed by my Lord *Cowper*, and no part whereof was possessed by Mr. *Booth* or Mr. *Powell*, the bill must be likewise dismissed, as against their representatives.

This will be a dismission of the whole bill as to all the plaintiffs, except Mr. *William Cowper*, and even with respect to him, as he is jointly concerned with the other plaintiffs in the personal estate of Mr. *Spencer Cowper*.

1*st*, As to any account of the personal estate of Mr. *Booth* received by my Lord *Cowper* and not invested in purchases, or

as to the rents and profits of the *Hertfordshire*, *Westmoreland*, and *London* estates received by my Lord, the plaintiffs claim as representatives and next of kin of Mr. *Cowper*, and if he was entitled, then was he a creditor of my Lord *Cowper*, and ought to have come in upon the foot of the decree made in the causes before mentioned.

My Lord by his will had charged all his estate real and personal with the payment of his debts, and by the decree Mr. *Spencer Cowper*, as well as his co-executor Mr. *Woodford*, was to account for the personal and the rents and profits of the real estates, the creditors were to come in and prove their debts, and the surplus only was to be laid out in purchases [733] pursuant to his Lordship's will; Mr. *Spencer Cowper* therefore might have craved an allowance in the account of his demand; or if not, might have come in as a creditor by the express provision of the decree, and one way or other (I conceive) he ought to have come in, for he had disclosed his demand by his answer to the cross bill, was party to the decree, and to the account taken pursuant thereto; and in such case I declare, I shall always be of opinion, that an executor or trustee ought not to lie by, and put the estate with which he is intrusted to the expence of a new suit, to obtain satisfaction for a demand which he might have had in the course of the former proceedings; this is not acting agreeable to his trust.

If there be a decree for an account to which an executor is party, and the executor has a debt which he does not claim, but lies by, and the account is taken and perfected, he shall not bring a new bill for his debt, and put the estate to a charge, this being contrary to the trust reposed in him.

2*dly*, As to the account of the rents and profits of the estates received after the death of my Lord *Cowper*, and brought into the account before mentioned, Mr. *Spencer Cowper* was party to that account and bound by it, and the plaintiffs who stand in his place, cannot avoid that bar by an original bill, no nor by a bill to establish it, though he did not think fit to prosecute it; so that, as to this account likewise, there must be a dismission, as being finally barred.

The great question then, in this case, concerns the *Hertfordshire* estate principally, which the sole plaintiff now remaining (Mr. *William Cowper*) claims, as cousin and heir of *William Cowper* the late Earl's son by his first wife.

With regard to that, the declarations of trust executed by my Lord *Cowper*, take notice of Mr. *Booth*'s will, and declare these lands were purchased with 4500*l.* being money arising [734] out of Mr. *Booth*'s personal estate, and were to be conveyed and settled to the uses of Mr. *Booth*'s will, and in the mean time that the rents and profits ought to be received by the

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persons entitled as if such settlement had been made. These declarations being relative to the will of Mr. *Booth*, if Mr. *Spencer Cowper* as uncle and heir of *William Cowper* became entitled by or under that will, it is the same as if the trust had been expressly declared for him, and then undoubtedly he had an equitable estate vested in him which hath descended to the plaintiff; and so is his title.

Indeed it has been objected, that although Mr. *Spencer Cowper* was heir to his nephew *William*, yet he was not next of kin, and if the 4500*l.* had remained in money, his Lordship would have had it, and after him the present Earl according to his father's will.

Lands cannot ascend from the son to the father, but shall rather escheat.

But this objection is of no weight; for had the 4500*l.* remained *in specie*, it must have been considered as land, and have been governed by Mr. *Booth*'s will; it is impossible for the father to be heir immediately to the son: nay, the law says, the land shall rather escheat; for which reason it must have descended to Mr. *Spencer Cowper*, else it could not have descended at all.

As to the hardship of setting up this right in respect to the person against whom the suit was brought, I own, and cannot forbear declaring, that were I to consider the matter, not as sitting in judicature, but taking in all manner of considerations, such as *honour*, *gratitude*, *private conscience*, &c. I must think this claim should never have been made. The defendant is son and heir of my Lord *Cowper*, in consequence of whose

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marriage with his first wife, the subject matter of the plaintiffs', as well as his father's claim, has arisen; their obligations to my Lord *Cowper* laid upon them in his life-time could not but be very great, and his kindness continued to the last, for by his will, they and their issue are put into the entail of the estate, to go along with the honour, which by his patent is limited to them; the defendant now sustains that honour, and every one would wish the whole estate to go along with it.

Though the law will not allow one of the half blood to be heir, yet there is no solid reason for it, for the uncle is not only more remote, but has but half the blood, he having none of the mother's blood.

Besides, as my Lord *Hale* said, in the case of *Collingwood* and *Pace*, 1 *Vent.* 424. the brother of the half blood is nearer than the uncle, and is therefore preferred in the administration; for the uncle on the part of the father, hath no more blood of the mother, than the brother of the second venter, and he hath the immediate blood of the father, which the uncle hath not; the uncle is forced to go up to the grandfather, and meet the blood of the nephew in him, so that it is impossible to find out a reason in nature for preferring the uncle to the half brother. Indeed he offers a legal reason for

it, which is this, (viz.) that our law agreeing with the canon law, makes brother and brother but one degree, and uncle and nephew two degrees, and thereby the law gives a mediate descent to the uncle *mediante patre*, but the descent to the brother must be immediate, if at all; and my Lord *Hale* holds, that the half blood impedes it: but now let us examine this; our law taking the computation of degrees of kindred from the canon law, (which by the way shortened the degrees or distance of relation, in order to increase the number of dispensations from the court of *Rome*) makes brother and brother but one degree; whereas the civil law, in its computation, went up to the common parent or father, and down again to the *persona proposita*, and so made brother and brother two degrees, which is certainly right; for there is no consanguinity among collaterals, but by meeting of the blood in some common person or parent; but now, taking our law to be right, why should the half blood impede the descent to the heir on the part of the father, why should the blood of a different mother hinder the descent to the heir of the father, especially when it is considered, that neither of the competitors hath any of the mother's blood, as hath been observed? These seem considerations of weight; but still, sitting in a legal judicature, I must judge of the plaintiff's claim as the law *is*, and not as I *would have it;* the Court must judge according to the stated rules of law and equity, and if the plaintiff's claim is not barred, nothing is plainer than his title; the law, if it had been a legal title, would undoubtedly have cast the descent upon his father, who by the declaration of trust had an equitable title; now equitable and legal estates are descendible in the same course. Uses before the 27 *H.* 8. were equitable estates; but yet the common law directed their descents, particularly there was a *possessio* (*a*) *fratris* of an use, as well as of a legal inheritance, 1 *Co.* 121. *b.* 4 *Co.* 22. which cite the year-book of the 5 *Ed.* 4. 7. *b.* so that the brother of the half-blood, was, in that case, excluded from the inheritance of an equitable, as well as of a legal estate.

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Equitable estates are guided by the same rules of descent as legal estates.

(*a*) Vide ante Banks v. Sutton, 713.

The Lord *Coke* † somewhere sets a value upon the laws of *England* in relation to descents, on account of the certainty of them; but considering how many trusts are now a-days created in lands, and how many questions have arisen concerning uses, whether executed or not, I think we should have little reason to boast of the certainty of our laws in the rules of descent, if legal estates were governed by one rule, and equitable by

Rules of descent so plain as that there are very few disputes about them.

† See the preface to his second report towards the end.

another. Besides, as my Lord *Cowper* thought proper to take the conveyance of the land in question to himself, let us now suppose he had lodged the legal estate in another person, could the present Earl have had the conveyance of the inheritance from that trustee? plainly he could not; now, if the plaintiff as heir, and not the defendant as brother of the half blood, must, under such circumstances, have been entitled to a conveyance, surely my Lord *Cowper*'s vesting the legal estate in himself can make no alteration in the case.

The next thing to be considered is, that supposing these objections not to stand in the plaintiff's way, as plainly they do not, then the question will be, whether any thing else is sufficient to bar his demands?

With regard to the proof of my Lord *Cowper*'s keeping his accounts of these estates jointly, and in the same manner with his other estates, of his letting leases of them, having them measured and mapped, and of Mr. *Spencer Cowper*'s saying that the late Earl had declared to him just before his death, he did not owe above 100*l.* and that there was not a more punctual and just man in the world than he, these proofs to me seem not material; for certainly my Lord *Cowper* thought the lands in question his own during his life, his enjoyment of them is a sufficient evidence of that, and it does not appear Mr. *Cowper* knew of this claim when he said these things.

The objections made against the plaintiff's claim (such I mean as seem of any weight) are these:

First, Length of time since the title accrued, which was from the death of Lord *Cowper*'s first wife in reversion, if not
[738] in possession. *Secondly*, The improbability of my Lord *Cowper*'s suffering his brother's title to stand out, when he might have obtained a release or conveyance of it. *Thirdly*, the tender, or slight manner in which the plaintiff's father mentioned his claim in his answer to the defendant's bill, and to Mr. *Sydenham* the late Earl's steward a little before his death. *Fourthly*, His not prosecuting his bill to make good that claim, but on the contrary, suffering a procedure whereto he was party to go on, and the rents of the lands in question to be accounted for as part of the late Earl's estate. *Fifthly*, His not coming in as a creditor for the *residuum* of Mr. *Booth*'s personal estate possessed by the late Earl, though as such, he was invited or directed by the decree: but above all, *Sixthly*, his possessing himself of the late Earl's papers, writings, and books of account after his death, without the participation of his co-executor Mr. *Woodford*, burning and destroying such as

he thought fit. These things most certainly give an unfavourable aspect to the plaintiff's claim, however go not so far as to bar it.

The case being not of an accidental loss, or suppression of a deed, two things are necessary for the defendants to prove,

1*st*, That Mr. *Spencer Cowper* did execute some deed or writing whereby the estate was conveyed or released to the Earl.

2*dly*, That such deed was destroyed or suppressed by him.

It must be granted, that the plaintiff's father having an equitable estate, if he is divested of that, it must be by some deed or writing sufficient for that purpose; this is supposed by the defendant's making the plaintiff's father's burning or destroying papers or writings a part of his defence; and therefore a presumption of satisfaction made by my Lord *Cowper* for this claim, is not (as was said by some of the defendant's counsel) of itself sufficient, but there must have been some deed or writing to convey or release the estate, or that will operate as such. Now it does not sufficiently appear, nor can it be inferred or presumed, that there was such a deed or writing, or that it was destroyed or suppressed by Mr. *Cowper*.

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As to the first objection, the length of time since the title accrued, which was upon the death of my Lord *Cowper*'s wife, in reversion, if not in possession, Mr. *Spencer Cowper* in his bill and the plaintiffs in theirs, suppose the title commenced then in possession, and demand an account accordingly; but the plaintiffs, at the hearing, abridged their demands, praying an account only from the death of my Lord *Cowper*, which in this case ought to be inserted in the decretal order, and will bind the plaintiffs who (particularly Mr. *William Cowper*) cannot say hereafter, that their father's title accrued in possession before the death of my Lord *Cowper;* but the defendants' counsel, in order to lengthen the laches of the plaintiff's father, may, by way of argument, still insist, as they have hitherto done, that it did accrue in possession on the death of my Lord's first wife. The first limitation is to *William Cowper* and *Judith* his wife for the term of their natural lives; this undoubtedly would carry an estate for both their lives, during the life of the survivor, and according to *Brudenell*'s case, 5 *Rep.* 9. which hath been always taken for law, unless the next words, [and after the decease of *Judith*, then to the child or children] restrain and make them carry only an estate during the joint lives of my Lord (then Mr.) *Cowper* and his lady; and indeed, if the latter words are not so taken, they must be totally rejected, and the subsequent limitations made to take place, not upon the death of Mrs. *Cowper*, ac-

Devise of land to husband and wife for their lives, and after the death of the wife, then to their children; upon the death of the wife the husband's estate determines.

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cording to the will, but to expect till the death of both; whereas on the contrary, if they are so taken, they may receive a construction, and be understood to vest the remainder in Mrs. *Cowper*, upon the determination of the former estate by the death of her husband; and I am of opinion, that this is the true way of construing Mr. *Booth*'s will, it being certain, that the literal and grammatical construction of a limitation to *A.* and *B.* for the term of their lives, is for the term of *both* their lives, for *their lives* being plural must comprehend both, and join them together; which is the legal construction too, where there is no particular reason to vary from it; for so it is held in Auditor *Curl*'s case, 11 *Rep.* 3. *b.* that an office granted to two *pro termino vitarum suarum*, determines by the death of one. Indeed in a limitation of lands it is otherwise; and the reason of the difference is this: a jointenancy of lands may be severed, and if it be not, the interest must consequently survive; which is otherwise in an office; and that it is so in lands, is not from the import of the words of that limitation, but from the institution or operation of law; for if the words imported a survivorship, it would be so in both cases; besides, upon a severance of the jointenancy in land, the estate does not continue during the life of each donee, but determines upon the death of one for his moiety, and of the other for his, according to *Dyer* 67. *a.* and 1 *Inst.* 197. *a.* which shews that the estate does not necessarily survive or continue for the whole as long as one of them lives. This different operation of the same words in the cases put, shews the intent of the donor, and consequently determines the effects of it; so in our case, the words subsequent to the limitation, (viz.) ["and after the decease of my daughter to the child or children, &c."] shew the testator's intent, and must determine the effects of the limitation, especially in a will, where the intent over-rules the legal import of the words, be they never so express and determinate.

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In a will, where the intention is plain, that ought to control the legal operation of the words.

I am sensible there is a diversity of opinions among the learned judges of the present time, whether the legal operation of words in a will, or the intent of the testator, shall govern? for my part, I shall always contend for the intention where it is plain, and I think the strongest authorities are on that side; for if the intention is sometimes to govern as it is admitted it must, and not always give way to the legal construction, and yet at other times shall not govern, there will then be no rule to judge by, nor will any lawyer know how to advise his client; a mischief which judges ought to prevent.

Thus much I have thought proper to say upon the question,

whether the remainder came into possession upon the death of Mrs. *Cowper*, or not till the death of her husband (afterwards Lord *Cowper*,) because it was laboured so much at the bar, and I did not care to pass it over superficially; but after all I think it not very material. If Mr. *Spencer Cowper* had any knowledge of his title before my Lord's death, it might have been material, by lengthening the time of his laches, but there is no proof of that; and Mr. *Woodford* by his answer says, that the 15th of *October* 1723, (five days after the Earl's death) was the first time Mr. *Cowper* mentioned his demand under Mr. *Booth*'s will, which Mr. *Woodford* says he never heard of before, nor is there ground to believe that Mr. *Cowper* knew any thing of it till after my Lord's death; he had no reason to think himself concerned in Mr. *Booth*'s estate, being a stranger to him in blood; besides if it had occurred to him, [742] that he was heir to Mr. *Booth*'s grandson, yet Mr. *Booth* was a citizen of *London*, had preferred his daughter in marriage, his estate almost all personal, how then could Mr. *Cowper* divine he would order it to be converted into land, and afterwards dispose of it in such a manner, as to carry it from his own heirs, and give it him?

As for the declarations of trust wherein Mr. *Booth*'s will is recited, how should Mr. *Cowper* know of them? they were deposited by my Lord *Cowper* with Mr. *Powell* the executor, and found after his death among his papers, as his executors say by their answer, which is not contradicted by proof; besides, one of these declarations takes notice that the other was deposited with Mr. *Powell*, and there being the same reason to deposit the one as the other, no doubt they were both so, and in Mr. *Powell*'s custody at the time of his death; so that there is no reason to suppose Mr. *Spencer Cowper* knew any thing of his title, till after my Lord's death.

But then they object the improbability of my Lord *Cowper*'s suffering his title to stand out when he might have obtained a release or conveyance of it.

As to this, I am in the dark, I mean, with respect to my Lord's knowledge of Mr. *Cowper*'s title; one would think, he had considered the limitations in the will, and consequently to whom the estate would go after his death; but that his Lordship was positive in his opinion, upon limitations, so ambiguous, does not appear, and is the more doubtful, as in neither of the declarations of trust executed by his Lordship, did he take upon him to determine, how the estate was to go by virtue of the limitations; all that he says is, that it *should go according*

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to the true intent of Mr. Booth's *will.* What power or influence my Lord *Cowper* had, doth not *judicially* appear; if he did obtain a release or conveyance from Mr. *Cowper*, it must be either before he had issue by his second lady, or after; now, before my Lord had such issue, Mr. *Cowper* was both heir to my Lord and to his son, and therefore my Lord, in case his son by his first marriage should die without issue, might think that the estate would go to his brother, and that he had no reason to endeavour to prevent it. It is proved my Lord's son died in 1697 or 1698, my Lord's first lady not till *April* 1705; and till issue born of the second marriage, there is no foundation to presume there was any such release or conveyance, and after he had issue by his second lady, he might think his brother would not do so *hard* a thing as to call for the legal estate, and separate it from the honour, an honour entailed upon himself and his issue.

Besides there is some evidence, that this title was standing out on my Lord's death: his Lordship deposited these declarations of trust with Mr. *Powell*, to be delivered to such as should have a right to the estate, and if he had got in his brother's title, most probably he would have called for the declarations, and not have left them in the hands of Mr. *Booth*'s executor, when he himself was sole owner of the estate.

3*d Object.* The slight and tender manner in which the plaintiff's father (Mr. *Spencer Cowper*) mentioned his claim in his answer to the defendant's bill, and to Mr. *Sydenham* the late Earl's steward, a little before his death.

Mr. *Cowper* in his answer says, "he is desirous the trusts of "the late Earl's will should be executed, and insists upon "his title to the benefit of the trusts therein contained, but

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"says, he conceives it might be proper by a bill to establish "his demand, though he found it necessary to disclose it by "way of answer to that bill, and prays to reserve to himself the liberty of establishing his demand, as he should be "advised, and saving it to himself, so far as the same should "appear just and reasonable, he submits to the execution of "the trust of my Lord *Cowper*'s will."

Mr. *Sydenham* examined for the defendant says, "that a "little before Mr. *Cowper*'s death, he took occasion to mention this demand of his upon the Earl's estate, and told him, "he hoped he would make an end of it in the easiest manner "he could, upon which he seemed to make very slight of it, "and said, there was a small piece of meadow near his canal "in a field called *Clunk-field*, which lay convenient for him,

" and if the present Earl would let him have this field, he " should make other matters extremely easy."

It seems plain, Mr. *Spencer Cowper*'s answer to the bill expresses a backwardness in setting up this title, and a tenderness in making the claim, and by what he said to Mr. *Sydenham*, he slighted and made little account of it (which claimants are not apt to do) yet there is something particular in this case, which takes away the force of the objection; for though the title upon which this claim is founded, be clear and plain to those that understand the law and common rules of equity, yet in the common opinion of mankind, it would be thought in itself, and in the circumstances attending it, very *hard and unreasonable, and the setting it up severely censured*; besides, it appears by Mr. *Sydenham*'s deposition, that this claim was not set up in order to carry things to the utmost extent, [745] but to obtain some acknowledgment for a release of the demand, and indeed it was like to have had that effect; for Mr. *Sydenham* says farther in his deposition, that the defendant, after he came to age, and before the filing of the present bill, offered the now plaintiff to comply with the proposal his father had made, and to convey the field, upon having a release.

The fourth objection is that of Mr. *Spencer Cowper*'s not prosecuting his bill brought to make good his claim, but on the contrary suffering the proceedings I have mentioned, and the rents of the lands claimed by him to be accounted for as part of the late Earl's estate.

And so far as that proceeding extends, it has proved a bar; but farther than that it cannot be carried, for it cannot operate as a bar to the realty, or as an extinguishment of the right to the land.

It is objected, that if Mr. *Spencer Cowper* had thought his claim to the land had subsisted, he would not have suffered a bar to an account of the rents and profits to have run upon him.

To this it may be answered, that possibly Mr. *Cowper* might think the pendency of his bill to establish his claim, would prevent that bar; but if he did not think so, yet he might be willing to suffer himself to be barred as to the mesne profits, or might intend no more by setting up his claim, than to obtain some acknowledgment for the release of it, especially as he must know that the setting it up would appear *hard, and could not escape censure;* which seems also an answer to the next objection to the plaintiff's claim, Mr. *Spencer Cowper*'s

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not coming in as a creditor for the *residuum* of Mr. *Booth*'s personal estate possessed by the late Earl, though he was, as such, invited and directed by the decree. Besides, he might
[746] not think it proper, or worth his while to enter into so stale an account, as that of Mr. *Booth*'s estate who died almost forty years before.

And now we come to the last objection (and which is the strongest) viz. Mr. *Spencer Cowper*'s possessing himself of the late Earl's papers and books of account, after his death, without the participation of Mr. *Woodford* his co-executor, burning and destroying such of them as he thought fit.

This is a fact of such a nature, that every circumstance relating to it ought to be thoroughly weighed, in order to see whether there be any foundation in precedent, reason or justice, for the presumptions which the defendant's counsel would build upon it, and this, not merely with regard to the present cause, but as it concerns property in general, and public justice.

The evidence of Mr. *Cowper*'s possessing himself of all the Earl's papers, those at *Colne-green* his house in the country, and those at his house in town in *George-street*, is very plain; the sum or substance of it is this: 1*st*, as to the papers and books of account in the country, notwithstanding there is some variety in the evidence as to the circumstantial part, yet it plainly appears, that on the 10th of *October* 1723, (the day my Lord died) Mr. *Spencer Cowper* was in the house at *Colne-green*, and none being present but Mr. *Sydenham*, he opened a bureau, took out papers, cancelled some, and afterwards the same day Mr. *Sydenham* found him alone with a greater quantity of papers and writings lying before him on the floor, torn and cancelled, which he told Mr. *Sydenham*, "he intended to "put out of the way, and would look over all the Earl's papers,
[747] "to preserve such as he thought proper, and destroy the rest." On the 13th of *October* Mr. *Woodford*, by his appointment, was come down to *Colne-green*, and before he came, Mr. *Cowper* ordered one of my Lord's servants to carry down a large basket of papers and writings into the kitchen to be burnt, and accordingly they were burnt in the kitchen-fire, in the presence of several of the common servants, one of which says, "he "saw on the top of the basket two books covered with white "vellum or parchment, such as my Lord used to keep his ac-"counts in."

2*dly*, As to the papers or writings in town, it appears, that on the 15th of the same month, Mr. *Cowper*, Mr. *Woodford*,

and Mr. *Sydenham*, came to my Lord's house in *George-street*, and in a closet below stairs there was a bureau, which by a key Mr. *Cowper* had in his pocket, was opened, and in it were several writings and papers, some of which Mr. *Cowper* only looked over, and took away with him, saying, they concerned the Earl personally, and not his estate, and locked up the closet, keeping the key, and that they all went up and opened an iron chest, put in some jewels and curiosities which they had found below, and took out some bank-bills, which were delivered to Mr. *Sydenham*, and then three locks were put upon the chest and each had a key; a day or two after this, Mr. *Cowper* told Mr. *Sydenham*, he would have all the Earl's papers and writings in town brought to his chambers, that he might peruse them, and put out of the way such as were not proper to be kept, and accordingly, without Mr. *Woodford*'s knowledge, he sent the key of the closet to Mr. *Sydenham*, who caused the papers to be taken out of the bureau and put in boxes, which boxes together with the iron chest, were sent to Mr. *Cowper*'s chambers, who several times after mentioned to Mr. *Sydenham*, that he had looked into the late Earl's papers, and destroyed such as were not fit to be seen. It appears, likewise, that applications were made to Mr. *Cowper*, on behalf of the Countess, desiring that she or some person for her might be present at the opening of the Earl's papers, which he declined, saying, that they were private papers not fit to be seen.

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Upon this evidence and the known maxim *omnia præsumuntur in odium spoliatoris*, the defendants' counsel would have two presumptions to arise. *First*, That Mr. *Spencer Cowper* had executed some deed or writing to the late Earl, whereby his title to the lands in question was conveyed or released: and, 2*dly*, That such deed or writing was by him burnt or destroyed.

Now, before I consider the evidence, I must premise, that this is going farther than any Court, either of law or equity, has gone in any case of suppressing or destroying evidence, that I know of. In that of *the King* (*a*) and *the Countess of Arundel*, *Hob.* 109, my Lord *Hobart* says, the suit (that is the bill) affirmed the King's title to be by the attainder of *Francis Dacres*, who (the bill said) was seised of an estate-tail: but the deeds whereby the estate was come to him were not extant, but very vehemently suspected to have been suppressed

How far courts of equity have gone in case of suppression of deeds.

(*a*) See this case stated with some others of the like nature in the case of *Dalston* and *Coatsworth*, vol. 1. 732.

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and withholden by some under whom the defendants claimed; and therefore the decree ran, "that the King and his heirs, "and the Lord *Hunsdon* his farmer, should hold and enjoy "the lands, until the defendants should produce the deeds, "and the Court thereupon take farther consideration and "order." This was a very solemn resolution, and with the greatest deliberation, for the * then (*a*) *Lord Chancellor* was assisted with the two *Chief Justices* and the *Master of the Rolls*. By the printed report the deeds are *supposed*, but not *said* to be proved; I have had the register's books searched, the decree is entered *Trinity* 14 *Jac.* 1. *lib. B. fol.* 1095. *b.* and drawn up thus: "that the King, his heirs and his farmer, "should hold and enjoy until the defendant produced the "deeds therein particularly mentioned and proved once to "have been extant and duly executed." Here we see the existence of the deeds was fundamental to the decree, and the proof of them fully and expressly asserted by the Court in framing the decree; in the case of *Garteside* and *Ratcliffe*, 1 *Chan. Cases* 292, the deed burnt or cancelled was proved; in that of *Hunt* and *Matthews*, 1 *Vern.* 408, the deed suppressed was proved; and in that of *Wardour* and *Beresford* (not rightly reported, 1 *Vern.* 452.) in the register's book of *Paschæ* 1687, *page* 491, there is this entry: "the *Lord* "*Chancellor*, on reading and examining witnesses *viva voce*, "declared that the papers (there called *Wynne*'s accounts) "were, through the carelessness of the defendant, embezzled, "and therefore confirmed the Master's report, which had not "made the defendant any allowance for diet, &c. by reason of "such embezzlement;" here the proofs of the embezzlement of the papers prove there were such papers. The case of the Countess of *Plymouth* and *Bladen*, reported 2 *Vern.* 32, appears by the register's books to be thus: the defendant was the plaintiff's steward, and the bill was brought for an account; the defendant pleaded, that the plaintiff had imprisoned him, and upon promise of his liberty had got a trunk, in which were all his vouchers, insisting that though he kept the key, yet it was easy to be opened, and that it was to be presumed it had been so, and was impossible for him to prove what the plaintiff had taken out, or to account without his vouchers; this plea was argued and ordered to stand for an answer; afterwards, by an interlocutory order, the trunk was directed to be delivered to the usher of the Court; and upon hearing of the cause, the then Lords Commissioners decreed the defendant to account, and ordered the trunk to be brought before the

(*a*) Lord Ellesmere.

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Master, who was to open it in the presence of both parties, and they to have copies of the papers found in it, as they should think fit: in this case the Court would not presume material papers, or even a suppression of any such, though it should seem that the trunk was got by the plaintiff in a very unwarrantable manner, and only took the best care they could that the papers, whatever they were, should be produced.

There have been no cases at law, and these are all the material ones that I have heard cited in equity; but though there may have been others, the names of which I cannot at present recollect, yet do I not remember or believe, there has been any one, where there was not some proof made of the existence of the deed or writing supposed to be suppressed or destroyed (1).

Now I shall consider the manner and circumstances of Mr. *Cowper*'s possessing himself of and burning and destroying these papers, writings, or books of accounts, in order to see whether they afford any sufficient presumption, that there was such a deed or writing, and that Mr. *Cowper* did burn or destroy it.

As to the transaction at the late Earl's house in the country, Mr. *Sydenham* was present when Mr. *Cowper* first opened the bureau, took out papers and cancelled some of them; and afterwards Mr. *Sydenham* was admitted into the room, when Mr. *Cowper* had a greater quantity of papers lying by him, torn and cancelled, which he frankly told Mr. *Sydenham* he [751] intended to put out of the way, and would look over all the Earl's papers, preserve such as he thought proper, and destroy the rest; this was on the 10th of *October;* on the 13th, before Mr. *Woodford* came down, he ordered one of my Lord's servants to carry down a large basket, full of paper writings, and books of account, into the kitchen to be burnt, and accordingly they were burnt (Mr. *Sydenham* says by Mr. *Cowper* himself) in a very public manner in the kitchen-fire, and in the presence of several of the common servants, which is to be presumed was not kept secret from my Lady *Cowper*, for Mr. *Cowper* refused to let any person for her be present at the opening of the Earl's papers, (though she desired it) saying, they were private papers not fit to be seen, which was avowing to her his design to destroy some papers, or at least to conceal them.

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(1) So, *Saltern* v. *Melhuish*, Amb. 249.

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But then it is asked, how came Mr. *Cowper* to open the late Earl's bureau in the country, search his papers, cancel and burn such as he thought fit, without the knowledge or participation of Mr. *Woodford*, and this too, before the coming of Mr. *Woodford*, who was to come there by his appointment?

Now although each executor, having the whole office in him, hath authority to do what Mr. *Cowper* did, yet I think he ought to have stayed for Mr. *Woodford* the other executor; but then it doth not appear that Mr. *Woodford* when he came, took upon him to act in any manner, or so much as to inquire concerning the late Earl's papers or books of account, or any of his affairs; and indeed he might reasonably think Mr. *Cowper*, whom he found in the house, had taken some
[752] care or other about my Lord's affairs; probably he might think Mr. *Cowper* being my Lord's brother, and one who had no interest in his Lordship's estate (that he knew of at that time) was more proper than himself to look into bureaus or cabinets, and inspect papers; and it appears he did think so, for when they both came to my Lord's house in town with Mr. *Sydenham*, Mr. *Cowper* brought with him the key of the bureau there, in which were several writings and papers, some of which Mr. *Cowper* only looked over and took away with him, saying they concerned the late Earl personally, and not his estate; and as Mr. *Cowper* had the key of the bureau with him, so Mr. *Woodford* let him lock up the closet where the bureau was, and carry away the key, which was putting it into his sole power to look over all the rest of the papers and writings, and dispose of them as he had already done of some others in Mr. *Woodford*'s presence; this accounts for Mr. *Cowper*'s doing what he did in relation to the other papers or books of accounts at *Colne-green*, without the knowledge or participation of Mr. *Woodford;* besides, either Mr. *Cowper* found the deed or writing supposed by the defendants' counsel, at my Lord's house in town, or in the country; if at his house in town, the searching of his papers and writings there by Mr. *Cowper*, having a power over them, was in some sort by Mr. *Woodford*'s consent; and if in the country that was done before, and it cannot be imagined, if Mr. *Cowper* had in his power what he wanted there, he would then have burnt or destroyed so many papers or writings in so public a manner, and after all this, have possessed himself of papers and writings in town with the privity of Mr. *Woodford*, have ordered Mr. *Sydenham* to send them to his chambers, and

several times after have told Mr. *Sydenham* he had been looking into them, and destroyed such as were not fit to be seen. Again, if Mr. *Cowper* had executed such a deed of release and had intended to suppress or destroy it, he would have [753] taken a secret and clandestine way for that purpose, as the suppression of deeds does in its nature suppose, and not have burnt papers and writings at several times in an open public manner.

For my part I do declare, that had there been the least positive proof of a release from Mr. *Cowper*, I would have totally dismissed the bill; but when such release or conveyance is only supposed or inferred from appearances, out of which that supposition does not necessarily or even naturally arise, and when my Lord *Cowper*'s leaving the declaration of trust in the hands of Mr. *Powell* does encounter it, I cannot but think this title is subsisting.

Upon the whole matter, my opinion is, this title *should not have been set up*, but now it is so, it appears a plain and a subsisting one.

The law is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraq; servat;* and as it is said in *Rook*'s case, 5 *Rep.* 99. *b.* that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is exercised here, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others, assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigour of it; but in no case does it contra- [754] dict or over-turn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with (*z*).

It is farther to be observed, that the legal interest of these lands passed by my Lord *Cowper*'s will, and the defendant the present Earl has an estate for life only therein, with a

(*z*) *Burgess* v. *Wheate*, 1 Black. 151. 1 Eden. 213.

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reversion in fee, after several intermediate remainders, some contingent, others vested, and consequently the plaintiff can have a conveyance only of such an estate as my Lord has; the counsel make no objection for want of my Lord's brother being a party, who has the next remainder, and is not before the Court, therefore I will take no notice of him; but the defendant must convey such estate and interest as he has in the *Hertfordshire* lands, and account for the profits. As to the time, or to what period this account is to go back, the Court has very reasonably taken a latitude, determining upon the circumstances of the case (*y*), and since the plaintiff's demand is *stricti juris*, he ought therefore to have strict legal measure meted to him. The plaintiff's father filed his bill not long after the late Earl's death, and if he had proceeded on that bill, might have had an account of the profits from that time, in the same manner as, in case of a legal title, he would have had from the time of his entry; but afterwards, he was so far from insisting upon a right to the profits from thence, or upon the benefit of his claim by that bill, as to suffer a proceeding whereto he was party, to be had in disaffirmance of it; and therefore the plaintiff's right must stand upon *his own* claim.

[755] Consequently, I decree the Earl *Cowper* to account for the profits of the *Hertfordshire* estate in question, the account to be taken from the filing of the plaintiff's bill, and the defendant to have all just allowances, and to be examined upon interrogatories as the Master shall direct †.

† From this decree (which was soon after inrolled) there was an appeal to the House of Lords, where the parties agreed, and that agreement (9 *Geo.* 2.) was confirmed by act of parliament.

(*y*) See *Bennet* v. *Whitehead*, ante, 644.

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